

No. 87-1318-ASX  
Status: GRANTED

Title: Volt Information Sciences, Inc., Appellant  
v.  
Board of Trustees of Leland Stanford Junior  
University

Docketed:  
February 8, 1988

Court: Court of Appeal of California,  
Sixth Appellate District

Counsel for appellant: Tully, Deanne M.

Counsel for appellee: Heilbron, David M.

NOTE: N/A filed 11/14/87 cited

Entry	Date	Note	Proceedings and Orders
1	Feb 8 1988	G	Statement as to jurisdiction filed.
2	Feb 8 1988		Appendix of appellant Volt Info. Sciences, Inc. filed.
3	Mar 7 1988		Motion of appellee Bd. of Trustees Leland Stanford University to dismiss or affirm filed.
4	Mar 9 1988		DISTRIBUTED. March 25, 1988
5	Mar 17 1988	X	Reply brief of appellant Volt Information Sciences, Inc. filed.
6	Mar 28 1988		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits. Justice O'Connor OUT. *****
8	Apr 28 1988		Order extending time to file brief of appellant on the merits until May 26, 1988.
9	May 11 1988		Joint appendix filed.
10	May 18 1988		Record filed.
		*	Certified copy of original record, box, received.
11	May 26 1988		Brief of appellant Volt Info. Sciences, Inc. filed.
13	Jun 13 1988		Order extending time to file brief of appellee on the merits until July 15, 1988.
14	Jul 15 1988		Brief of appellees Bd. of Trustees Leland Stanford Univ. filed.
15	Jul 20 1988		CIRCULATED.
16	Aug 1 1988	D	Application (A88-96) by Appellant to file a reply brief in excess of page limits, submitted to Justice Scalia.
17	Aug 4 1988		Application (A88-96) denied by Justice Scalia.
18	Aug 9 1988	X	Reply brief of appellant Volt Information Sciences, Inc. filed.
19	Sep 30 1988		Set for argument. Wednesday, November 30, 1988. (4th case) (1 hr.)
20	Nov 30 1988		ARGUED.

87 No. 1318

Supreme Court, U.S.

FILED

FEB 8 1988

JOSEPH F. SPANIOL, JR.  
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

---

VOLT INFORMATION SCIENCES, INC.,  
Appellant,

vs.

BOARD OF TRUSTEES OF LELAND STANFORD  
JUNIOR UNIVERSITY, Appellee.

---

ON APPEAL FROM THE  
COURT OF APPEAL OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

---

JURISDICTIONAL STATEMENT

JAMES E. HARRINGTON  
(Counsel of Record)  
ROBERT B. THUM  
DEANNE M. TULLY  
PETTIT & MARTIN  
101 CALIFORNIA STREET  
SAN FRANCISCO, CA 94111  
PHONE: (415) 434-4000

COUNSEL FOR APPELLANT

718



QUESTION PRESENTED

Whether a California statute limiting the enforceability of arbitration agreements, which directly conflicts with the Federal Arbitration Act and would therefore ordinarily be preempted in any case involving a transaction covered by the Act, may nevertheless be applied in such a case to deny enforcement of an arbitration agreement, where the agreement appears in a construction contract that is to be performed in California and the contract contains a choice-of-law clause specifying that it "shall be governed by the law of the place where the project is located."

STATEMENT PURSUANT  
TO 28 U.S.C. §2403(b)

Since this appeal presents the question whether a California statute conflicts with the Federal Arbitration Act and is therefore invalid under the Supremacy Clause of the United States Constitution, appellant hereby informs the Court that the provisions of 28 U.S.C. §2403(b) may be applicable, and that the Court may therefore invite the Attorney General of California to file a brief in support of the validity of the statute. Pursuant to Rule 28.4(c) of the Rules of this Court, a copy of this Jurisdictional Statement will be served on the Attorney General.

## TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	5
HOW THE FEDERAL QUESTION WAS PRESENTED	5
STATEMENT OF THE CASE	7
THE ISSUE PRESENTED BY THIS CASE DESERVES PLENARY REVIEW BY THIS COURT	16
I. Introductory Summary	16
II. There Is No Serious Dispute That, Unless the Choice-of-Law Clause in the Parties' Contract Were Found to Dictate a Differ- ent Result, the Federal Arbitra- tion Act Would Preempt the State Statute Relied upon by the Court Below and Would Require Reversal of Its Decision Relieving Stan- ford of Its Duty to Arbitrate Its Dispute with Volt.	19
III. The State Courts and Lower Federal Courts Have Reached Widely Diver- gent Conclusions Concerning the Effect of a Choice-of-Law Clause on Federal Preemption of State Laws Limiting the Enforceability of Arbitration Agreements.	27
A. The Majority View	27
B. The Minority View Represented by the Decision of the Court Below	33
C. This Court's Treatment of the Issue in the de la Cuesta Case	35

IV. The Issue of the Effect of a Choice-of-Law Clause on Federal Preemption of State Arbitration Laws Is Inherently Important, Both Because It Is Likely to Arise with Great Frequency and Because Its Proper Resolution Will Determine the Ultimate Enforceability of Arbitration Agreements in a Large Proportion of the Cases Brought Under the Federal Arbitration Act.	41
IN THE EVENT THE COURT SHOULD DECLINE TO UNDERTAKE PLENARY REVIEW OF THIS CASE, THE DECISION OF THE COURT BELOW SHOULD BE SUMMARILY REVERSED	46
I. Introduction	46
II. Even if the Court Should Be Disinclined to Grant a Plenary Hearing in This Case, Dismissal of the Appeal Would Not Be Warranted Because It Would Effectively Overrule, Not Only Most of the Decisions of the Lower Courts on the Issue Presented Here, but Also a Prior Ruling of This Court.	47
III. Summary Reversal of the Court Below, on the Other Hand, Would Be Eminently Appropriate in This Case, Because the Decision of That Court Cannot Be Defended on Any Legitimate Ground.	50
A. The Language of the Parties' Agreement	51
B. The Intent of the Parties	54
C. The Dictates of Federalism	57
CONCLUSION	59

# TABLE OF AUTHORITIES

## Cases

Acevedo Maldonado v. PPG Industries, Inc., 514 F.2d 614 (1st Cir. 1975)	22
ADC Const. Co. v. McDaniel Grading, Inc., 338 S.E.2d 733 (Ga.App. 1985)	33,42
Allison v. Medicab Intl., 597 P.2d 380 (Wash. 1979)	25
American Ry. Exp. Co. v. Levee, 263 U.S. 19 (1923)	4
C. Itoh & Co. v. Jordan Intl. Co., 552 F.2d 1228 (7th Cir. 1977)	22
Chamberlin v. Dade County Bd. of Public Inst., 377 U.S. 402 (1964)	50
Chan v. Drexel, Burnham, Lambert, Inc., 223 Cal.Rptr. 838 (Cal.App. 1986)	21
Claflin v. Houseman, 93 U.S. 130 (1876)	58
Collins Radio Co. v. Ex-Cell-O Corp., 467 F.2d 995 (8th Cir. 1972)	32
Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263 (7th Cir. 1976)	30,31,37
Cone Mills Corp. v. August F. Nielsen Co., 455 N.Y.S.2d 625 (N.Y.Sup.Ct. 1982)	32,38
County of Jefferson v. Barton-Douglas Contractors, Inc., 282 N.W.2d 155 (Iowa 1979)	44
Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985)	23

de la Cuesta v. Fidelity Fed. S. & L. Assn., 175 Cal.Rptr. 467 (Cal.App. 1981), revd. 458 U.S. 141 (1982)	39
Del E. Webb Const. Co. v. Richardson Hosp. Auth., 823 F.2d 145 (5th Cir. 1987)	24,33,42
Episcopal Housing Corp. v. Federal Ins. Co., 239 S.E.2d 647 (S.C. 1977)	23,28,42
Eric A. Carlstrom Const. Co. v. Independent School Dist. No. 77, 256 N.W.2d 479 (Minn. 1977)	34,42
Fidelity Fed. S. & L. Assn. v. de la Cuesta, 458 U.S. 141 (1982)	2,4,18,36, 37,38,39, 40,49,57
Ford v. Shearson, Lehman American Express Co., 225 Cal.Rptr. 895 (Cal.App. 1986)	32,38
Garden Grove Comm. Church v. Pittsburgh-Des Moines Steel Co., 191 Cal.Rptr. 15 (Cal.App. 1983)	33,34,38, 39,55
Hamilton Life Ins. Co. v. Republic Natl. Life Ins. Co., 408 F.2d 606 (2d Cir. 1969)	22
Harris v. Rivera, 454 U.S. 339 (1981)	50
Hauenstein v. Lynham, 100 U.S. 483 (1880)	58
Hicks v. Miranda, 422 U.S. 332 (1975)	47,49
Hilti, Inc. v. Oldach, 392 F.2d 368 (1st Cir. 1968)	22
Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., 625 F.2d 22 (5th Cir. 1980)	25,28,32,42



Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979)	48
In re Mercury Constr. Corp., 656 F.2d 933 (4th Cir. 1981), affd. sub nom. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	24
International Longshoremen's Union v. Davis, — U.S. —, 106 S.Ct. 1904 (1986)	2
Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968)	3
Jago v. VanCuren, 454 U.S. 14 (1981)	50
J.F. Incorporated v. Vicik, 426 N.E.2d 257 (Ill.App. 1981)	44
LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Co., 791 F.2d 1331 (9th Cir. 1986)	32
Lane-Tahoe, Inc. v. Kindred Const. Co., 536 P.2d 491 (Nev. 1975)	34, 42
Liddington v. The Energy Group, Inc., 238 Cal.Rptr. 202 (Cal. App. 1987)	23, 32, 38
Main v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 136 Cal. Rptr. 378 (Cal.App. 1977)	21
Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634 (Tex.Civ.App. 1973)	29, 37
Mandel v. Bradley, 432 U.S. 173 (1977)	47, 48
McCarty v. McCarty, 453 U.S. 210 (1981)	2, 4
Merrill, Lynch, etc. v. McCollum, 666 S.W.2d 604 (Tex.Civ.App. 1984), cert. den. 469 U.S. 1127 (1985)	21

Mesa Operating Ltd. P'ship. v. Louisiana Intrastate Gas Comm., 797 F.2d 238 (5th Cir. 1986)	31,38
Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157 (1954)	4
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1986)	40
Mondou v. New York, N.H. & Hartford R.R. Co. (Second Employers Liabil- ity Act Cases), 223 U.S. 1 (1912)	58
Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., 460 U.S. 1 (1983)	21,22
Pathman Const. Co. v. Knox Cty. Hosp. Assn., 326 N.E.2d 844 (Ind.App. 1975)	25
Paul Allison, Inc. v. Minikin Storage, Inc., 486 F.Supp. 1 (D.Neb. 1979)	25,29,31,42
Perry v. Thomas, U.S. ___, 107 S.Ct. 2520 (1987)	2,4,20,26
Pinkis v. Network Cinema Corp., 512 P.2d 751 (Wash. 1973)	33
Prestressed Concrete, Inc. v. Adolph- son & Peterson, 240 N.W.2d 551 (Minn. 1976)	44
Prima Paint Co. v. Flood & Conklin, 388 U.S. 395 (1967)	24
R.J. Palmer Constr. Co. v. Wichita Band Instr. Co., 642 P.2d 127 (Kan.App. 1982)	23
Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)	40

Southland Corp. v. Keating, 465 U.S. 1 (1984)	2,21,25,26
Standard Co. of New Orleans v. Elliott Const. Co., 363 So.2d 671 (La. 1978)	33,34,42
TAC Travel Amer. Corp. v. World Air- ways, Inc., 443 F.Supp. 825 (S.D. N.Y. 1978)	32
Testa v. Katt, 330 U.S. 386 (1947)	58
Tully v. Griffin, 429 U.S. 68 (1976)	47,48
United States v. Maryland Savings- Share Ins. Corp., 400 U.S. 4 (1970)	50

Statutes, Rules  
and Constitutional Provisions

U.S. Const., art. VI, cl. 2	passim
9 U.S.C. §§1-4	passim
28 U.S.C. §1257(2)	2,3
28 U.S.C. §2101(c)	4
Calif. Code Civ. Proc. §1281.2(c)	passim
Calif. Rules of Court, Rule 24(a)	4
Calif. Rules of Court, Rule 28(b)	4

Treatises

Corbin, Contracts (1960)	53
Wright et al., Federal Practice & Procedure (1977)	2

#### OPINIONS BELOW

The opinion of the California Court of Appeal is reprinted as Appendix A hereto, and is reported in the advance-sheet edition of the California Appellate Reports at 195 Cal.App.3d 349, and in the West's California Reporter at 240 Cal.Rptr. 558. The order of the California Supreme Court denying appellant's petition for review of the court of appeal's decision is unreported and is reprinted as Appendix B. The order of the state trial court denying appellant's petition to compel arbitration, also unreported, is reprinted as Appendix C.

#### JURISDICTION

The principal issue presented by this case, at all levels of the proceedings below, has been whether section 1281.2(c) of the California Code of Civil Procedure is preempted and hence rendered invalid, as applied to this case, by provisions of the Federal Arbitration Act with which this state statute is in direct conflict (see App. A, pp. 6-12). The state trial court and court of appeal have rejected appellant's contention that section 1281.2(c)

is preempted by the federal Act, and have accordingly sustained its application to this case as a basis for denying appellant's petition to compel arbitration (id.). Under the decisions of this Court, such a ruling of a state court, rejecting a claim that the application of a state statute in a particular case is preempted by federal law, constitutes a "decision in favor of [the] validity" of the statute as against a contention that it is "repugnant to the Constitution, laws or treaties of the United States" within the meaning of 28 U.S.C. §1257(2). International Longshoremen's Union v. Davis, \_\_\_ U.S. \_\_\_, 106 S.Ct. 1904, 1910n.8 (1986); McCarty v. McCarty, 453 U.S. 210, 219-20n.12 (1981). See Perry v. Thomas, \_\_\_ U.S. \_\_\_, 107 S.Ct. 2520 (1987) (appeal accepted without discussion); Southland Corp. v. Keating, 465 U.S. 1 (1984) (semble); Fidelity Fed. S. & L. Assn. v. de la Cuesta, 458 U.S. 141 (1982) (semble); 16 Wright et al., Federal Practice & Procedure §4012 at p. 603 (1977) (Court's appeal jurisdiction under 28 U.S.C. §1257(2) is "regularly



exercised in cases involving conflict with federal statutes"). This statutory prerequisite to the assertion of this Court's appellate jurisdiction is therefore clearly satisfied in this case.

This case also fulfills the other condition prescribed by the governing statute for the Court's acceptance of jurisdiction over this appeal - namely, that the appeal be taken from a "[f]inal judgment or decree of the highest court of a State in which a decision could be had." 28 U.S.C. §1257(2). Appellant's claim of preemption has been rejected on the merits by a final judgment of an intermediate appellate court of California, and the California Supreme Court has exercised its discretion to decline to review the case (Apps. A, B). In these circumstances, the intermediate appellate court is effectively constituted "the highest court of [the] State in which a decision could be had," and its judgment accordingly becomes reviewable by appeal to this court. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 678n.1 (1968);



Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157, 160 (1954); American Ry. Exp. Co. v. Levee, 263 U.S. 19, 20 (1923). See Perry v. Thomas, supra (appeal accepted without discussion of this point); Fidelity Fed. S. & L. Assn. v. de la Cuesta, supra (semble); McCarty v. McCarty, supra (semble).

Finally, there is no question that this Court's jurisdiction has been timely and properly invoked by appellant. The judgment of the court of appeal was rendered on October 5, 1987, and appellant timely sought review of the judgment by filing a petition for review in the state Supreme Court on November 12, 1987 (Apps. A, G). See Calif. Rules of Court, Rules 24(a); 28(b). The order of the state Supreme Court denying appellant's petition for review was entered on December 17, 1987 (App. B), and the notice of appeal was filed in the intermediate appellate court on January 14, 1988, which is well within the time permitted by the governing statute for the taking of an appeal to this Court. 28 U.S.C. §2101(c) (90 days); American Ry. Exp. Co. v. Levee, supra at 20 (time runs

from denial of discretionary review by state supreme court). A copy of the notice of appeal is being filed herewith as Appendix D.

#### STATUTES INVOLVED

The constitutional and statutory provisions involved in this case are the Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl. 2), sections 1-4 of the Federal Arbitration Act (9 U.S.C. §§1-4), and section 1281.2(c) of the California Code of Civil Procedure. These provisions are set forth in Appendix H.

#### HOW THE FEDERAL QUESTION WAS PRESENTED

Appellant's claim that section 1281.2(c) of the California Code of Civil Procedure is preempted by the conflicting prescriptions of the Federal Arbitration Act was repeatedly raised by appellant at every stage of the proceedings below. The following are but a few examples of appellant's numerous assertions of this contention at each level of the state court proceedings: (1) appellant argued in the state trial court that this state statute was constitutionally inapplicable to this case

because, "[t]o the extent any California law could be interpreted as preventing enforcement of or interfering with the arbitration agreement, it violates the Supremacy Clause and is null and void" (App. E, p. 6); (2) appellant argued in the state court of appeal that "the Supremacy Clause of the United States Constitution ... dictates that the Federal Arbitration Act preempts any state law, including C.C.P. §1281.2(c), that purports to impose restrictions on the enforcement of arbitration agreements of a kind not authorized by the federal Act" (App. F, p. 13); and (3) appellant argued in the state Supreme Court that, under a proper interpretation of the choice-of-law clause in the parties' contract, the provisions of the Federal Arbitration Act requiring arbitration of their dispute would apply to this case, and "would clearly preempt the conflicting prescriptions of C.C.P. §1281.2(c)" (App. G, pp. 7, 23-25). The state court of appeal expressly acknowledged appellant's arguments to this effect by addressing the preemption issue at considerable

length in its opinion rejecting appellant's claim (App. A, pp. 6-12). Copies of pertinent excerpts from the several briefs in the state trial court, court of appeal, and Supreme Court illustrating appellant's repeated statements of its contention on this issue have been filed herewith as Appendices E through G.

#### STATEMENT OF THE CASE

Appellant Volt Information Sciences, Inc. ("Volt"), and appellee Leland Stanford Junior University ("Stanford") are parties to a construction contract pursuant to which Volt has constructed a system of electrical conduits connecting various computer facilities on the Stanford campus (JA 17\*). Only two of the provisions of this voluminous contract are directly relevant to this appeal. The first of these, the choice-of-law clause, appears in a section of the contract entitled "General

---

\* The portions of the record in this case which are not included in the Appendix to this Jurisdictional Statement are contained in the Joint Appendix that was filed by the parties in the state court of appeal. See Calif. Rules of Court, Rule 5.1. The Joint Appendix is cited herein as "JA."

Conditions," which consists of a standard-form agreement widely used in the construction industry and generally known as "AIA Document A201" (JA 39). This clause provides simply that "[t]he Contract shall be governed by the law of the place where the project is located" (JA 49).

The other pertinent clause of the agreement, the arbitration clause, appears in a separate section of the contract entitled "Supplementary General Conditions," which consists of a series of special provisions prepared by Stanford that modify the standard-form General Conditions in various respects (JA 58). This particular clause provides that the arbitration clause appearing in the standard-form agreement shall be deleted, and that the following provision shall be inserted in its stead (JA 61):

"All claims, disputes and other matters in question between the parties to this contract, arising out of or relating to this contract or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing unless the parties mutually agreed [sic] otherwise. In any other arbitration, commenced or demanded pursuant to this



Contract, then either party hereto, upon the written request of the other party, shall join in such arbitrations and agree to the consolidation of the arbitrations. This agreement to arbitrate and to join and consolidate arbitrations shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in any court having jurisdiction thereof."

The principal difference between this provision and the arbitration clause in the standard-form agreement which it displaces concerns the conditions under which an arbitration between the parties may be consolidated with another arbitration of a dispute between one of the parties and a third person arising out of the same project. The standard-form clause would have expressly prohibited consolidation of such third-party disputes without the written consent of all concerned parties (JA 50). By contrast, the substituted special provision quoted above not only pointedly omits any such prohibition, but additionally includes an express mandate for the consolidation of any separate arbitrations that might arise from the parties' transaction (JA 61).

Stanford thus clearly contemplated the



possibility of potentially duplicative proceedings resulting from disputes with other participants in the project, and deliberately chose to deal with this problem, not by inserting a proviso excusing the parties from their duty to arbitrate in that event, but rather by simply authorizing the consolidation of any separate arbitrations that might result from such disputes. Having chosen this course, however, Stanford then inexplicably neglected to include arbitration clauses in the agreements which it entered into with these other participants (JA 126, 135, 144). The contracts with the project architect and the construction manager, in particular, omitted any provision for arbitration of disputes arising under those contracts (id.).

During the course of the project, various disagreements arose between Volt and Stanford which the parties were unable to settle by negotiation (JA 182-83). Accordingly, at the conclusion of the project, Volt submitted to Stanford a demand for arbitration of these disputes pursuant to the arbitration clause of

the parties' contract (JA 185). Stanford, however, refused to proceed with the arbitration, and instead filed suit against Volt in the state superior court for Santa Clara County (JA 1, 184). In its complaint, Stanford asserted several causes of action against Volt involving all of the same matters that were the subject of Volt's demand for arbitration (JA 5-12, 185-88). In addition, the complaint stated a single cause of action for declaratory relief against the architect and construction manager, in which Stanford sought a declaration that, in the event it should be held liable to pay any damages to Volt, these firms should be required to indemnify it for any amount thus paid (JA 12-13).

Volt thereupon petitioned the superior court, pursuant to both the Federal Arbitration Act, 9 U.S.C. §§1 et seq., and the California Arbitration Act, Calif.Code Civ.Proc. §§1280 et seq., to compel arbitration and to stay the prosecution of Stanford's claims against it pending the outcome of the arbitration (JA 153). Stanford, in turn, moved to stay the

arbitration, contending that arbitration of its dispute with Volt could not be compelled during the pendency of litigation involving additional claims against the architect and construction manager arising out of the same transaction which could not be arbitrated because of the omission of any arbitration clause from its agreements with those parties (JA 209). In support of its motion, Stanford relied on the provisions of section 1281.2(c) of the California Code of Civil Procedure, which permits a superior court to deny a petition to compel arbitration or to stay a pending arbitration when "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact."

In its opposition to Stanford's motion, Volt contended that section 1281.2(c) was inapplicable in the circumstances presented here, and that in any event, since this project

involved interstate commerce, this state statute was effectively preempted by the conflicting requirements of the Federal Arbitration Act, which do not permit avoidance of an arbitration agreement on the grounds specified by this statute (JA 235; App. E). In its response to this latter contention, Stanford did not dispute that the application of federal law would indeed require enforcement of its agreement to arbitrate, but instead contended that the federal Act was rendered inapplicable in this context by the provision of the parties' agreement specifying that its enforcement should be governed by "the law of the place where the project is located" (JA 225-27).

Apparently in reliance on this choice-of-law clause, the superior court rejected Volt's argument that Code Civ.Proc. §1281.2(c) was preempted by federal law and held that this statute effectively excused Stanford from its obligation to arbitrate (App. C). The court accordingly entered an order denying Volt's petition to compel arbitration and granting

Stanford's motion to stay the arbitration until the conclusion of the lawsuit (id.).

Volt filed a timely appeal to the California Court of Appeal for the Sixth Appellate District, reiterating its contention that Calif.Code Civ.Proc. §1281.2(c) was preempted by the contrary prescriptions of the Federal Arbitration Act (JA 255; App. F). On the specific issue of the effect of the choice-of-law clause, Volt argued (1) that the clause did not in fact preclude the application of federal law because the phrase "law of the place where the project is located" necessarily encompassed all of the law - local, state, and federal - that was in fact applicable at the project site; (2) that the same result would follow even if this phrase were construed as an exclusive reference to California law, because the nature of the federal system is such that federal law constitutes an integral part of the law of California, as of every other state; and (3) that in any event, a substantial body of authority had held that any such contractual choice-of-law provision that purported to



foreclose the application of the Federal Arbitration Act to a transaction that would otherwise be subject to its terms should simply be invalidated as an illicit attempt to subvert the objectives of the Act (App. F, pp. 11-20).

The court of appeal rejected all of these arguments and affirmed the superior court's order in an opinion in which two members of the court joined (App. A). The court held that application of the federal Act was foreclosed by the choice-of-law clause and accordingly rejected Volt's preemption claim and sustained the superior court's reliance on Code Civ.Proc. §1281.2(c) as a proper basis for denying Volt's petition to compel arbitration (id.). The third member of the court dissented from this ruling, stating his view that the choice-of-law clause did not preclude the application of federal law to this case, because, in his words, "even assuming arguendo that it must be interpreted as an agreement to have California law govern, ... where federal law is supreme, California law mandates that federal law controls" (id., pp. 19-23).



Volt filed a timely petition for review in the California Supreme Court, again reiterating all of the arguments it had made in the courts below and, in addition, calling the court's attention to the several conflicting resolutions of the question presented by this case that had been reached by various appellate courts in California and elsewhere (App. G). On December 17, 1987, the Supreme Court issued its order denying Volt's petition for review (App. B). By the same order, the court directed that the court of appeal's opinion should not be published in the permanent edition of the official California Appellate Reports (id.). Volt filed its notice of appeal to this Court on January 14, 1988 (App. D).

THE ISSUE PRESENTED BY THIS CASE  
DESERVES PLENARY CONSIDERATION BY THIS COURT

I. Introductory Summary

This case presents probably the most important unresolved issue affecting the relationship between the Federal Arbitration Act and the laws of the several states governing arbitrability of private disputes. That issue is whether a state statute limiting

arbitrability of such disputes, which directly conflicts with the federal Act and would therefore ordinarily be preempted in any case covered by the Act, may nevertheless be applied in such a case to deny enforcement of an arbitration agreement where the contract contains a choice-of-law clause specifying that it shall be governed by the law of the place where the contract is to be performed.

To date, this question has arisen in no less than sixteen reported decisions of the state appellate courts and lower federal courts, and these decisions have offered an unfortunate profusion of disparate answers to the question. Although most courts have held that such a choice-of-law provision is ineffective to preclude application of the federal Act and consequent preemption of conflicting state laws, even the decisions representing this majority view have espoused widely differing rationales to support this result, ranging from straightforward interpretations of the contractual language to sweeping pronouncements of the outright

invalidity of any contractual provision that might restrict the application of federal law. Meanwhile, a small minority of decisions, exemplified by the decision of the court of appeal in this case, have adopted a contrary view that such a choice-of-law clause entirely precludes the application of the Federal Arbitration Act and accordingly permits reliance on state statutes that would otherwise clearly be preempted by its terms. These aberrant holdings have persisted notwithstanding a decision of this Court that would seem to have rejected this minority position some years ago by clearly declaring, albeit in a case not involving the subject of arbitration, that a contractual choice-of-law provision referring to "the law of the jurisdiction" where the contract is to be performed necessarily "includes federal as well as state law" and therefore does not prevent federal preemption of otherwise conflicting state laws. Fidelity Fed. S. & L. Assn. v. de la Cuesta, supra, 458 U.S. at 157n.12.

This wide divergence of views among the

lower courts, which will be described in more detail in the discussion that follows, is the most obvious reason why the issue presented by this case merits plenary consideration by this Court. The other, equally compelling reason, which is also discussed more fully below, is the inherent importance of this issue, which directly affects the enforceability of arbitration agreements in a great number of transactions, including precisely those types of transactions in which such agreements are most commonly utilized.

II. There Is No Serious Dispute That, Unless the Choice-of-Law Clause in the Parties' Contract Were Found to Dictate a Different Result, the Federal Arbitration Act Would Preempt the State Statute Relied upon by the Court Below and Would Require Reversal of Its Decision Relieving Stanford of Its Duty to Arbitrate Its Dispute with Volt.

Before turning directly to a discussion of the importance of the issue presented here and the conflict over that issue that has arisen among the decisions of the lower courts, it is necessary to demonstrate initially that this issue is indeed dispositive of the outcome of this suit and hence squarely presented for decision on the facts of this case. This

demonstration will involve nothing more than the brief statement of certain familiar propositions regarding the general applicability of the Federal Arbitration Act. Taken together, these propositions establish that, unless the choice-of-law clause in the parties' contract were found to dictate a different result, the federal Act would govern the disposition of this case and would require that Stanford be compelled to arbitrate its dispute with Volt, notwithstanding the conflicting dictates of the state statute that was relied upon by the courts below to relieve Stanford of its obligation in this regard.

First of all, it is by now well settled that the Federal Arbitration Act creates a comprehensive body of substantive law governing all arbitrations arising out of transactions affecting interstate commerce, and that its provisions are therefore required to be enforced in state courts, as well as federal courts, to the exclusion of any conflicting provisions of state law. Perry v. Thomas, \_\_\_ U.S. \_\_\_, 107 S.Ct. 2520, 2525 (1987); South-



land Corp. v. Keating, 465 U.S. 1, 12 (1984);  
Moses H. Cone Mem. Hosp. v. Mercury Constr.  
Co., 460 U.S. 1, 24, 26 (1983); Chan v. Drexel,  
Burnham, Lambert, Inc., 223 Cal.Rptr. 838, 841  
(Cal.App. 1986); Main v. Merrill, Lynch,  
Pierce, Fenner & Smith, Inc., 136 Cal.Rptr.  
378, 381 (Cal.App. 1977); Merrill, Lynch,  
Pierce, Fenner & Smith, Inc. v. McCollum, 666  
S.W.2d 604, 609-10 (Tex.Civ.App. 1984), cert.  
den. 469 U.S. 1127 (1985). As this Court  
stated in the often quoted passage from its  
opinion in Moses H. Cone Mem. Hosp. v. Mercury  
Constr. Co., supra, the Act "create[s] a body  
of federal substantive law of arbitrability  
applicable to any arbitration agreement within  
the coverage of the Act," which "governs that  
issue in either state or federal court ...  
notwithstanding any state substantive or  
procedural policies to the contrary." Id., 460  
U.S. at 24.

Secondly, it is equally clear that if the  
federal Act were to be applied to this case,  
its application would necessarily mandate  
judicial enforcement of Stanford's agreement to

arbitrate its dispute with Volt, and would thus require reversal of the decisions of the courts below denying Volt's petition for that relief. As noted earlier, and as the court of appeal's opinion makes clear, the sole basis for those decisions was the provision of section 1281.2(c) of the California Code of Civil Procedure that authorizes denial of a petition to compel arbitration where related non-arbitrable claims have been asserted against third parties in a pending lawsuit. The Federal Arbitration Act contains no counterpart provision permitting avoidance of an arbitration agreement in these circumstances, and the decisions of the state and federal courts applying the Act have therefore unanimously held that the existence of such non-arbitrable third-party claims does not afford a proper ground for denying or staying the enforcement of such an agreement. Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, 460 U.S. at 19-20; C.Itoh & Co. v. Jordan Intl. Co., 552 F.2d 1228, 1231 (7th Cir. 1977); Acevedo Maldonado v. PPG Industries, Inc., 514 F.2d 614, 617 (1st

Cir. 1975); Hamilton Life Ins. Co. v. Republic Natl. Life Ins. Co., 408 F.2d 606, 609 (2d Cir. 1969); Hilti, Inc. v. Oldach, 392 F.2d 368, 369n.2 (1st Cir. 1968); Liddington v. The Energy Group, Inc., 238 Cal.Rptr. 202, 207 (Cal.App. 1987); R.J. Palmer Constr. Co. v. Wichita Band Instr. Co., 642 P.2d 127, 131 (Kan.App. 1982); Episcopal Housing Corp. v. Federal Ins. Co., 239 S.E.2d 647, 652 (S.C. 1977). Cf. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218-21 (1985) (arbitration compelled despite "intertwining" of arbitrable and non-arbitrable claims). If applied in this case, this settled federal rule would clearly preempt the directly conflicting prescriptions of section 1281.2(c) and hence eliminate the only legal basis for the denial of Volt's petition. As the court of appeal itself acknowledged, it is thus "apparent that were the federal rules to apply, Volt's petition to compel arbitration would have to be granted" (App. A, pp. 3-4).

Finally, there is no question that, unless otherwise dictated by the choice-of-law clause,

federal law would indeed govern the disposition of this case, because the arbitration agreement at issue here clearly "evidenc[es] a transaction involving ... commerce among the several states" within the meaning of the provisions of the federal Act defining the scope of its coverage. 9 U.S.C. §§1-2. Volt established by uncontradicted evidence in the trial court that a large proportion of its manpower and equipment was transferred or shipped to California from other states for use on the Stanford project, and that the project was administered from Volt's offices outside California (JA 207-8). Under the standards enunciated in the case law on this issue, these facts clearly establish a sufficient nexus with interstate commerce to bring this transaction well within the purview of the federal Act. Prima Paint Co. v. Flood & Conklin, 388 U.S. 395, 401 (1967); Del E. Webb Const. Co. v. Richardson Hosp. Auth., 823 F.2d 145, 147-48 (5th Cir. 1987); In re Mercury Constr. Corp., 656 F.2d 933, 942 (4th Cir. 1981), affd. sub nom. Moses H. Cone Mem. Hosp. v. Mercury.

Constr. Corp., supra, 460 U.S. 1 (1983);

Pathman Const. Co. v. Knox Cty. Hosp. Assn.,

326 N.E.2d 844, 848-51 (Ind.App. 1975);

Episcopal Housing Corp. v. Federal Ins. Co.,

supra, 239 S.E.2d at 650-52; Allison v. Medicab

Intl., 597 P.2d 380, 382 (Wash. 1979).

All of these settled propositions were apparently accepted by the courts below, and in fact have never been seriously contested by Stanford itself.\* It follows that the only

---

\* This description of Stanford's position must be qualified in one minor respect. In its brief in the court of appeal, Stanford attempted, somewhat obliquely, to cast some doubt on the general applicability of the remedial provisions of the federal Act in state courts by pointing to an admittedly somewhat puzzling footnote in the opinion of this Court in Southland Corp. v. Keating, supra, where the Court, in the course of responding to one of the points made by the dissenting justice, had suggested that the sections of the Act specifying the methods for enforcing arbitration agreements might not be specifically applicable in state trial courts (Stanford's Brief, pp. 12-13, citing Southland, supra, 465 U.S. at 16n.10). In its reply brief, Volt responded to this argument by demonstrating at considerable length that the actual holdings of this Court, including the holding in Southland itself, as well as the decisions of many state and lower federal courts on the issue, had clearly established that the remedies and procedures prescribed by the federal Act, whether by virtue of these particular sections or otherwise, were enforceable in (contd.)



remaining issue standing in the way of a determination that the state statute relied upon by the courts below was indeed preempted by the Federal Arbitration Act, and that Volt's petition to compel arbitration pursuant to the Act should therefore have been granted, is the question whether the application of the federal Act to this case is foreclosed by the clause in the parties' agreement specifying that its enforcement "shall be governed by the law of the place where the project is located." Having thus established that this issue is indeed squarely presented by this case, Volt

---

(footnote contd.) state courts as well as in federal courts (Volt's Reply Brief, pp. 15-34). This entire debate was ultimately mooted by another decision of this Court handed down after the filing of the briefs but before the oral argument in the court of appeal. In that decision, Perry v. Thomas, supra, the Court squarely held, by specifically enforcing a petition to compel arbitration brought in a California superior court under the very sections of the Act referred to in the Southland footnote, that these procedural provisions of the federal Act were indeed fully applicable in state courts. Id., 107 S.Ct. at 2523 and n.1. As the court of appeal apparently assumed in its opinion in this case, this intervening decision of this Court has effectively eliminated any serious possibility of further controversy over this point.

will now turn to a demonstration that the issue clearly warrants plenary review by this Court, because of both its inherent importance and the conflict it has engendered among the state and lower federal courts.

III. The State Courts and Lower Federal Courts Have Reached Widely Divergent Conclusions Concerning the Effect of a Choice-of-Law Clause on Federal Preemption of State Laws Limiting the Enforceability of Arbitration Agreements.

---

A. The Majority View

As noted above, the overwhelming majority of the numerous decisions of the lower courts that have addressed the issue presented by this case have resolved that issue in a manner precisely contrary to the decision of the court below. Those decisions have held that the application of the Federal Arbitration Act and the consequent preemption of conflicting state laws limiting the enforceability of arbitration agreements is not precluded by the presence in the parties' contract of a choice-of-law clause specifying that the contract shall be applied in accordance with the law of a particular state or "the law of the place" where the contract is to be performed. Unfortunately,

however, these decisions have relied upon several different and even sometimes contradictory approaches to the issue, and have therefore failed to develop any consistent rationale to justify this result.

Thus, some of the courts adopting this view, in cases involving contractual language identical or similar to the language of the contract at issue in this case, have simply interpreted that language as literally encompassing federal as well as state law. Typical of these decisions is the holding of the South Carolina Supreme Court in Episcopal Housing Corp. v. Federal Ins. Co., supra, which involved the same form contract that is at issue here. The court in that case disposed of the choice-of-law issue as follows (id., 239 S.E.2d at 650n.1):

"The court is aware of Section 7.1.1 of the American Institute of Architects Document A201 which provides that, 'The contract shall be governed by the law of the place where the project is located.' This provision, however, would certainly include all applicable law, including the Federal Arbitration Act."

Accord Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., 625 F.2d 22, 25n.8 (5th

Cir. 1980). See also Paul Allison, Inc. v. Minikin Storage, Inc., 486 F.Supp. 1, 2-4 and n.1 (D.Neb. 1979).

A second group of decisions, which have involved choice-of-law provisions referring expressly to the laws of a particular named state, have reached the same result on the somewhat different ground that any such reference to the laws of a state of the United States must be deemed to encompass federal as well as state law because it is a basic tenet of our federal system that the laws of every state incorporate and include the laws of the United States. These decisions are illustrated by the opinion of the Texas Court of Civil Appeals in Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634 (Tex.Civ.App. 1973), where the parties' agreement provided that it should be construed "in accordance with the laws of the State of New York," and the court held that this language necessarily encompassed the Federal Arbitration Act, because, in its words, "[t]he Federal Arbitration Act is the law of New York and also the law of Texas with respect

to any 'contract evidencing a transaction involving commerce.'" Id., 490 S.W.2d at 637. See also Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1270 (7th Cir. 1976) (quoting Mamlin, supra). This is of course the same view that was taken by the dissenting justice in the court of appeal in this case (App. A, pp. 19-23).

Thirdly, several courts have managed to reach the same ultimate result despite their adoption of a quite opposite interpretation of the language of the choice-of-law provision. These courts, while implicitly conceding that a choice-of-law clause designating the law of a particular state or "the law of the place" of performance would literally preclude the application of the Federal Arbitration Act, have nevertheless refused to give effect to such a provision on the ground that to do so would subvert the purposes of the Act. The leading decision to this effect is the ruling of the Seventh Circuit in Commonwealth Edison Co. v. Gulf Oil Corp., supra, which involved a choice-of-law clause specifying "the law of the



State of Illinois" as the law governing the application of the agreement. The court held that even if this provision should be interpreted as manifesting an intent to adopt Illinois law to the exclusion of the Federal Arbitration Act, the federal Act would still be deemed to govern the issue of enforceability of the arbitration agreement because the parties had no power to preclude the application of the Act by a choice-of-law clause in their agreement. The court justified this holding as follows (id., 541 F.2d at 1269):

"Parties are not free to burden the arbitration process under the Federal Act by adopting state law which shifts the determination of disputes from arbitrators to the courts. To allow parties to so contract would undermine the provisions of the Federal Act. Congress, in enacting the Federal Arbitration Act, exercised its power over admiralty and interstate commerce. Any arbitration agreement involving one of those areas is governed by the Federal Act. To permit the parties to contract away the application of the Act by adopting state law to govern their agreement would be inconsistent with the Act itself ...."

Accord Mesa Operating Ltd. P'ship. v. Louisiana Intrastate Gas Comm., 797 F.2d 238, 243-44 (5th Cir. 1986); Paul Allison, Inc. v. Minikin Storage, Inc., supra, 486 F.Supp. at 3. See

also Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., supra, 625 F.2d at 25n.8; Cone Mills Corp. v. August F. Nielsen Co., 455 N.Y.S.2d 625, 627 (N.Y.Sup.Ct. 1982). Cf. Becker Autoradio USA, Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 43 and n.8 (3d Cir. 1978).

The final category of decisions reaching this result have done so without espousing any particular rationale for their rulings. They have simply proceeded to apply the provisions of the Federal Arbitration Act in the face of a choice-of-law clause designating state law as the governing law without affording any significant discussion to the issue raised by the presence of this provision in the contract. LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Co., 791 F.2d 1334, 1338-39 (9th Cir. 1986); Collins Radio Co. v. Ex-Cell-O Corp., 467 F.2d 995, 997-98 (8th Cir. 1972); Hilti, Inc. v. Oldach, supra, 392 F.2d at 370; TAC Travel Amer. Corp. v. World Airways, Inc., 443 F.Supp. 825, 827 (S.D.N.Y. 1978); Liddington v. The Energy Group, Inc., supra,

238 Cal.Rptr. at 204, 207; Ford v. Shearson, Lehman Amer. Express Co., 225 Cal.Rptr. at 896, 897 (Cal.App. 1986); Pinkis v. Network Cinema Corp., 512 P.2d 751 (Wash. 1973). See also Del E. Webb Const. Co. v. Richardson Hosp. Auth., supra, 823 F.2d at 147 (choice-of-law clause not mentioned, but contract was AIA Document A201, which contains the clause at issue here); ADC Const. Co. v. McDaniel Grading, Inc., 338 S.E.2d 733, 735 (Ga.App. 1985) (semble).

B. The Minority View Represented by the Decision of the Court Below

Arrayed against this sizable majority of decisions upholding the application of the Federal Arbitration Act despite the presence of a choice-of-law clause in the parties' contract are two contrary decisions which have held, like the court of appeal in this case, that the inclusion of such a provision in the contract effectively forecloses reliance on the federal Act and requires resolution of the issue of arbitrability in exclusive accordance with state law. Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., 191 Cal.Rptr. 15, 20 (Cal.App. 1983); Standard Co. of New

Orleans v. Elliott Const. Co., 363 So.2d 671, 677 (La. 1978).<sup>\*</sup> One of these cases (Standard Co., supra) involved contractual language identical to the language at issue here, and the other (Garden Grove, supra) involved a very similar provision which the court described as adopting "the law of the construction site" to govern the application of the parties' contract. Garden Grove, supra at 20; Standard Co., supra at 677. In both cases, the courts interpreted the choice-of-law clauses as an exclusive reference to state law and on that basis held that the Federal Arbitration Act had no application to the issue of arbitrability of

---

<sup>\*</sup> In addition to these two cases, the opinion of the court of appeal cites two additional decisions as support for its holding to this effect in this case (App. A, pp. 5-6, citing Eric A. Carlstrom Const. Co. v. Independent School Dist. No. 77, 256 N.W.2d 479 (Minn. 1977), and Lane-Tahoe, Inc. v. Kindred Const. Co., 536 P.2d 491 (Nev. 1975)). With due respect to the court of appeal, the fact is that neither of these latter decisions has any bearing whatever on this issue. In both cases, the choice-of-law clause was referred to only as a basis for selecting between the laws of different states. The possible application of federal law to the issue of arbitrability was not even raised or considered by the court in either case.

the parties' dispute. Id.

In neither of these cases does the court offer any rationale for this interpretation of the contractual language other than its own ipse dixit. Id. Nor does the court's opinion in either case exhibit any awareness of the substantial body of authority espousing a contrary view on this issue. At all events, however, the significance of these decisions for present purposes is simply that they serve to demonstrate that the decision of the court below in this case is not merely an idiosyncratic anomaly, but instead represents only the latest manifestation of a significant minority position on this issue that has persisted for some time among the decisions of the lower courts.

C. This Court's Treatment of the Issue in the de la Cuesta Case

This divergence of opinion among the lower courts on the issue presented here has endured despite an authoritative pronouncement by this Court in an opinion handed down several years ago that should have been viewed as settling the issue in favor of one of the several



rationales adopted by the courts espousing the majority view on the question. This Court's observations on this issue were delivered in the course of its opinion in Fidelity Federal S. & L. Assn. v. de la Cuesta, supra, which sustained a federal preemption challenge to a rule of state law invalidating "due-on-sale" clauses in certain real-property mortgages issued by federally chartered lending institutions. One of the arguments that had been offered in defense of the state rule and accepted by the court below in that case was a contention that federal law was itself rendered inapplicable to these mortgages by a choice-of-law clause in the mortgages which specified that their application should be "governed by the law of the jurisdiction in which the property is located." Id., 458 U.S. at 148, 150-51. The Court disposed of this argument in a footnote to a passage of its opinion in which it had reaffirmed the general principle that federal law is an inherent part of the law of each state. Id. at 157. In that footnote, the Court stated (Id. at 157n.12):

"This principle likewise leads us to reject appellees' contention that, with respect to the two deeds of trust containing ¶15, see n.5, supra [the choice-of-law provision], appellants did in fact agree to be bound by local law. Paragraph 15 provides that the deed is to be governed by the 'law of the jurisdiction' in which the property is located; but the 'law of the jurisdiction' includes federal as well as state law."

This statement by this Court would seem to constitute an authoritative endorsement of the view, espoused by the dissenting judge in the court below and by some of the courts representing the majority view on the issue presented here, that a choice-of-law clause referring to "the law of" a particular state or "the law of the place" where the contract is to be performed necessarily incorporates applicable federal law by reason of the basic constitutional principle of federal supremacy. App. A, pp. 19-23; Mamlin v. Susan Thomas, Inc., supra, 490 S.W.2d at 637. See also Commonwealth Edison Co. v. Gulf Oil Corp., supra, 541 F.2d at 1270. Unfortunately, however, it is clear from the subsequent course of the decisions on this issue that the Court's statement to this effect has not in fact been accepted by the various lower courts as

settling the issue in this manner for purposes of determining the preemptive effect of the Federal Arbitration Act.

Thus, two of the decisions, including the decision of the court below, which have reached a conclusion on this issue diametrically opposed to the view adopted in this Court's de la Cuesta opinion were handed down well after the publication of that opinion; and the other decisions on the issue rendered after that date, while consistent with de la Cuesta in their results, have failed to mention the opinion in support of their rulings and have sometimes espoused very different and even incompatible rationales to justify those results. Mesa Operating Ltd. P'ship. v. Louisiana Intrastate Gas Comm., supra; Liddington v. The Energy Group, Inc., supra; Ford v. Shearson, Lehman Amer. Express Co., supra; Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., supra; Cone Mills Corp. v. August F. Nielsen Co., supra. Indeed, one of the decisions directly contravening the de la Cuesta ruling with respect to a very similar

choice-of-law clause was rendered only a year after the de la Cuesta decision by the same court - the California Court of Appeal for the Fourth District - whose decision had been reversed on this very point in de la Cuesta itself. Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., supra. See de la Cuesta v. Fidelity Fed. S. & L. Assn., 175 Cal.Rptr. 467, 475 (Cal.App. 1981), revd. 458 U.S. 141 (1982).

The implication is clear that, for whatever reason,\* the pronouncements of this Court in

---

\* The most likely explanation for this puzzling phenomenon is not judicial opacity or obstinacy, but rather understandable oversight. As counsel themselves can attest, the Court's footnote disposition of this issue in the de la Cuesta opinion easily evades detection by normal research methods, not being mentioned in any of the standard sources that one might ordinarily consult in the course of research concerning the effect of a choice-of-law clause on federal preemption of state arbitration laws. For this reason, the de la Cuesta holding was overlooked by counsel for both parties, as well as by the courts themselves, in the course of the proceedings in the lower courts in this case, even though both Volt's briefs and the opinion of the dissenting justice in the court of appeal enunciated precisely the same reasoning that had been adopted by this Court in disposing of this issue in de la Cuesta (App. A, pp. 19-23; App. F, pp. 14-18).



its opinion in the de la Cuesta case have not sufficed, and are not likely to suffice in the future, to resolve the conflict that currently exists among the lower courts on the issue presented by this case. If that conflict is ever to be resolved, and if the considerable confusion on this issue is ever to be alleviated, further elucidation of the issue by this Court will therefore plainly be necessary.\* The fact that this case affords an appropriate opportunity for such further

---

\* No other opinion of this Court, besides de la Cuesta, has addressed the specific issue presented by this case. Although the Court has encountered choice-of-law clauses in arbitration agreements in two other cases, neither of those decisions has any real bearing on this issue. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). Each of those decisions upheld a litigant's right, under the Federal Arbitration Act, to compel arbitration of a dispute arising from an international transaction, as against a contention that the policies underlying certain other federal statutes guaranteed a judicial forum for the dispute. Id. The choice-of-law clauses in the parties' agreements were only tangentially mentioned in the Court's opinions, and no issue was raised in either case concerning the effect of these clauses on the applicability of the federal Act. Mitsubishi, supra, 473 U.S. at 637n.19; Scherk, supra, 417 U.S. at 508, 519n.13.



elucidation is the first and most obvious reason why the Court should grant a plenary hearing of this appeal.

IV. The Issue of the Effect of a Choice-of-Law Clause on Federal Preemption of State Arbitration Laws Is Inherently Important, Both Because It Is Likely to Arise with Great Frequency and Because Its Proper Resolution Will Determine the Ultimate Enforceability of Arbitration Agreements in a Large Proportion of the Cases Brought Under the Federal Arbitration Act.

Besides the conflict that currently exists among the decisions on this issue, the other principal reason that justifies review of this case by this Court is the inherent importance of the issue presented here. This issue is important for two reasons.

First, the issue has been presented with great frequency in cases arising under the Federal Arbitration Act. As indicated in the preceding section, the question whether the application of the Act may be excluded by a choice-of-law clause in the parties' agreement has already reached the appellate level in at least sixteen cases during the relatively few years since the comprehensive preemptive effect of the Act was initially discerned by the

courts.\* There is no reason why this question will not continue to arise with the same frequency in the future. Given the likelihood of this eventuality, the prospect of a continuation of the wide disparity of views on this issue that presently exists among the lower courts becomes all the more intolerable and needful of correction by this Court.

The second reason this issue is important is that the application of a choice-of-law clause will actually determine the enforceability of arbitration agreements in a substantial proportion of the cases in which enforcement of such agreements is sought under the federal Act. This conclusion can be

---

\* Indeed, no less than eight of the cases cited above have involved precisely the same choice-of-law clause from the same standard-form contract that is at issue in this case. Del E. Webb Const. Co. v. Richardson Hosp. Auth., supra; Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., supra; Paul Allison, Inc. v. Minikin Storage Co., supra; ADC Const. Co. v. McDaniel Grading, Inc., supra; Standard Co. of New Orleans v. Elliott Const. Co., supra; Eric A. Carlstrom Const. Co. v. Independent School Dist. No. 77, supra; Lane-Tahoe, Inc. v. Kindred Const. Co., supra; Episcopal Housing Corp. v. Federal Ins. Co., supra.

demonstrated merely by examining the single example afforded by the particular kind of obstacle that was posed by state law to the enforcement of the parties' agreement in this case - namely, a state rule permitting a party to evade his contractual duty to arbitrate by commencing litigation involving non-arbitrable ancillary claims against third persons.

Thus, if the cases cited earlier can be taken as a fair sample, it may be plausibly surmised that two of the categories of commercial transactions in which contracts containing both arbitration agreements and choice-of-law clauses are most commonly utilized are construction contracts and brokerage and sales contracts in the securities industry (see cases cited at pages 20-24 and 28-33, supra). Both of these kinds of transactions are inherently likely to involve other participants besides the immediate parties to the agreement, such as the architect, construction manager, and subcontractors on a construction project, and the buyer, the seller, and each party's broker in a securities

transaction. As illustrated by this case and several of the other cases cited above, it is quite easy, given modern liberal rules of joinder, for these other participants to be joined in any litigation that might arise between the parties to the arbitration agreement. Where state law regards the pendency of such multi-party claims as affording a legal excuse from compliance with the duty to arbitrate - as it does in California by virtue of the statute at issue on this appeal and in several other states by virtue of judge-made doctrines - the arbitration agreement is effectively rendered unenforceable under state law against any party who may choose to take advantage of this procedural device to avoid his duty in this regard. Cal.Code Civ.Proc. §1281.2(c). See also J.F. Incorporated v. Vicik, 426 N.E.2d 257 (Ill.App. 1981); County of Jefferson v. Barton-Douglas Contractors, Inc., 282 N.W.2d 155 (Iowa 1979); Prestressed Concrete, Inc. v. Adophson & Peterson, 240 N.W.2d 551 (Minn. 1976). Since federal law does not permit an arbitration agreement to be

avoided in this manner (see cases cited at pp. 22-23, supra), the choice between federal and state law will effectively determine the enforceability of the arbitration agreements in all of these kinds of cases; and this choice in turn will depend upon the interpretation given by the court to the choice-of-law clause that is typically found in these types of contracts. Thus, the ultimate determinant of the enforceability of the parties' agreement to arbitrate in this entire category of cases will be the court's disposition of precisely the issue of interpretation of a choice-of-law clause that is presented in this case.

If it is considered that these cases involving multi-party claims represent only one example of the myriad situations in which state and federal law may differ with respect to the enforceability of arbitration agreements, and in which the court's choice of the applicable law may ultimately depend on its construction of a choice-of-law clause, the conclusion is inescapable that the choice-of-law issue that is presented in this case will have a deter-



minative effect on the outcome of a very sizable percentage of the cases in which arbitration agreements are brought before the courts for enforcement pursuant to the Federal Arbitration Act. This is the second, and perhaps the most significant, reason why this issue is sufficiently important to warrant plenary review by this Court.

IN THE EVENT THE COURT SHOULD DECLINE  
TO UNDERTAKE PLENARY REVIEW OF THIS  
CASE, THE DECISION OF THE COURT BELOW  
SHOULD BE SUMMARILY REVERSED

#### I. Introduction

In the event these considerations should prove insufficient to persuade the Court to grant a plenary hearing in this case, two alternatives would then be open to it - dismissal of the appeal "for want of a substantial federal question" and summary reversal of the decision of the court of appeal. In this section, Volt will endeavor to show (1) that the first of these alternatives is infeasible because it would effectively overrule, not only most of the decisions of the lower courts on the issue presented here, but also a decision of this Court itself, and (2)

that the second alternative, by contrast, would be entirely appropriate in the circumstances of this case because no plausible argument can be advanced to sustain the judgment of the court below.

II. Even if the Court Should Be Disinclined to Grant a Plenary Hearing in This Case, Dismissal of the Appeal Would Not Be Warranted Because It Would Effectively Overrule, Not Only Most of the Decisions of the Lower Courts on the Issue Presented Here, but Also a Prior Ruling of This Court.

It is well settled that a dismissal of an appeal to this Court "for want of a substantial federal question" is an adjudication on the merits that establishes a binding precedent for the adjudication of all future cases raising the same issue. Hicks v. Miranda, 422 U.S. 332, 343-45 (1975). Accord Mandel v. Bradley, 432 U.S. 173, 176 (1977) (same rule for summary affirmances); Tully v. Griffin, 429 U.S. 68, 74-75 (1976) (semble). Although the precedential effect of such a summary disposition is limited to "the specific challenges presented in the statement of jurisdiction" and to "the precise issues presented and necessarily decided" by the Court's action, it remains true

that, within those limits, an appeal properly brought before this Court cannot be summarily dismissed without establishing "a controlling precedent" on the issues clearly presented by the appeal. Mandel v. Bradley, supra at 176; Tully v. Griffin, supra at 74. See also Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 180-83 (1979).

Both this jurisdictional statement and the holding of the court below in this case have raised a single narrow issue for decision by this Court - whether a state statute limiting the arbitrability of private disputes, which would otherwise be preempted by the Federal Arbitration Act, may nevertheless be applied to deny enforcement of an arbitration agreement on the basis of a choice-of-law clause in the parties' agreement. The clarity and distinctness with which this issue is presented by this appeal are plainly sufficient, under the rule enunciated above, to compel the conclusion that a dismissal of the appeal would necessarily amount to a ruling by this Court on the merits of that issue. Compare Tully v. Griffin,

supra; Hicks v. Miranda, supra. In effect, the holding of the court below that a choice-of-law clause of the kind involved here effectively precludes the application of an otherwise binding federal statute, and hence validates a rule of state law that clearly contravenes that statute, would thus become the law of the land.

Volt submits that this would be an unfortunate and intolerable result. Not only would it overrule the nearly unanimous decisions of the more than a dozen lower courts that have reached a contrary conclusion on this precise issue; but it would also effectively overrule this Court's own contrary ruling concerning the effect of a nearly identical choice-of-law clause in its earlier opinion in Fidelity Fed. S. & L. Assn. v. de la Cuesta, supra. Contemplation of these untoward consequences should be sufficient to persuade the Court that dismissal of this appeal "for want of a substantial federal question" would have disadvantages more serious than those that attend similar dispositions of most of the appeals that are brought before the Court.

III. Summary Reversal of the Court Below,  
on the Other Hand, Would Be Eminently  
Appropriate in This Case, Because the  
Decision of That Court Cannot Be  
Defended on Any Legitimate Ground.

Unlike a summary dismissal, a summary disposition of this case by reversal of the court below would not be at all inappropriate in the circumstances presented here. Although summary reversals without full briefing are admittedly unusual, this Court has not hesitated to take such action where it has appeared that the decision of the lower court was so clearly erroneous that further briefing would not be a worthwhile expenditure of the Court's time. E.g., United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4 (1970); Chamberlin v. Dade County Bd. of Public Inst., 377 U.S. 402 (1964). Cf. Harris v. Rivera, 454 U.S. 339 (1981) (summary reversal on certiorari papers); Jago v. VanCuren, 454 U.S. 14 (1981) (semble).

This case meets that description. The earlier discussion has already established that the decision of the court below represents a distinct departure from precedent, inasmuch as



it contravenes both the nearly unanimous decisions of the other lower courts and an earlier ruling of this Court on the precise issue presented here. In the discussion that follows, Volt will additionally demonstrate that, even apart from this consideration and even if this issue were to be viewed as one of first impression, the decision below would be indefensible in any event because it violates every relevant legal principle that ought to bear on the resolution of the issue, ranging from basic rules for interpreting the language of a contract to fundamental constitutional precepts defining the proper relationship between federal and state law under our federal form of government.

A. The Language of the Parties' Agreement

The decision of the court below reflects, first of all, a misreading of the plain language of the parties' agreement. The court somehow managed to read into the phrase "law of the place where the project is located" an exclusive reference to California state law, which would effectively exclude, not only the

law of other states, but also the federal statutory law that would otherwise have been applicable at the site of this project (App. A, pp. 4-6). In fact, however, the court's interpretation of this contractual language is plainly unsound, whether the language is viewed in isolation or as a part of the contract as a whole.

Thus, on its face, the term "law of the place where the project is located" would seem to encompass all of the several bodies of law - state, local, and federal - that are in fact applicable at the site where this contract was performed. There is absolutely nothing in this phrase to suggest an intent to exclude any of these equally applicable bodies of law or to select only one of them, to the exclusion of the others, as the sole source of the law governing the parties' transaction.

Nor does such a selective reading of this contractual term make sense in the context of the entire contract between the parties. To take but one example, certain sections of the contract require the contractor to "pay all

sales, consumer, use and other similar taxes" applicable to his work, and to "comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority bearing on the safety of persons or property" at the project site (JA 46, 53). The interpretation of the choice-of-law provision adopted by the court below would have the bizarre and obviously unintended result of confining the coverage of these sections to taxes and safety regulations enacted at the state level and of excluding all of the numerous similar provisions that have been adopted by both the federal government and the local governmental bodies having jurisdiction over the project. Thus, the court's peculiarly narrow reading of the choice-of-law clause contravenes, not only the literal words of the clause itself, but also the basic rule that any contractual provision must be viewed against the background of the complete contract and interpreted in a fashion that is consistent with the entirety of its provisions. See, generally, 3 Corbin, Contracts §549 (1960).

B. The Intent of the Parties

The court of appeal's otherwise unsupportable interpretation of the contractual language cannot be justified - and, if anything, is further belied - by an examination of the probable intent of the parties with respect to the law that would govern their agreement. Although the court intimates at several points in its opinion that there is some evidence, other than the terms of the agreement itself, that the parties consciously "chose to be governed by California law" to the exclusion of the Federal Arbitration Act (App. A, pp. 5, 11, 15), there is in fact no evidence that would support any such notion, and indeed what little evidence exists on the question suggests a clearly contrary conclusion.

The court itself acknowledges that neither party presented any direct evidence of the intent underlying the adoption of either the choice-of-law clause or the arbitration clause (App. A, p. 5). Indeed, since the personnel who executed the contract were construction executives and not lawyers (JA 22), it may

fairly be presumed that they had never heard of either Calif.Code Civ.Proc. §1281.2(c) or the contrary provisions of the Federal Arbitration Act, and consequently had no clear idea of the potential significance of the choice-of-law clause with respect to the enforceability of their agreement to arbitrate their dispute.

The circumstances do suggest, however, that Stanford at least was quite aware of the literal terms and requirements of the arbitration clause itself, since, as indicated above, this clause was prepared by Stanford as a substitute for the standard-form clause ordinarily used with this form of agreement (JA 61). As was also noted earlier, the adoption of this provision reflected a clear awareness on Stanford's part of the possibility of simultaneous disputes with the several participants in the project and the consequent problem of duplicative litigation (id.). Stanford could easily have dealt with this problem by inserting a proviso excusing it from its duty to arbitrate in the event of such disputes with non-parties to the agreement. See Garden Grove



Comm. Church v. Pittsburgh Des Moines Steel Co., supra. It deliberately chose not to do this, however, and instead adopted a provision that expressly preserved its duty to arbitrate notwithstanding the pendency of such third-party disputes, subject only to the possibility that Volt might be required to consolidate the arbitration of its claim with any pending arbitrations with third parties arising out of the transaction (id.). Thus, to the extent the evidence indicates anything about the parties' intent, it shows that Stanford fully intended to proceed with arbitration of its dispute with Volt despite the problem posed by the existence of potential claims against other parties. Since this is precisely the result that would be mandated by federal law and frustrated by the application of state law to the present dispute, this evidence, if anything, ultimately supports the conclusion that federal law should govern this controversy. At all events, it clearly refutes the court of appeal's suggestion that its aberrant reading of the choice-of-law clause might somehow be justified

on the basis of some notion that the parties consciously "chose to be governed by California law" on this issue.

C. The Dictates of Federalism

Finally, as has been suggested at several points in the earlier discussion, the court of appeal's exclusion of federal law from the coverage of the phrase "law of the place where the project is located" violates the fundamental constitutional principle that federal law is "the supreme law of the land," applicable in every state and at every place throughout the union to the same extent as state law. As noted above, this principle was invoked by the dissenting judge in the court of appeal to justify his disapproval of the court's ruling, and also by this Court in the de la Cuesta case to support its interpretation of a nearly identical choice-of-law clause in a manner precisely contrary to the decision of the court below. App. A, pp. 19-23; Fidelity Fed. S. & L. Assn. v. de la Cuesta, supra, 458 U.S. at 157n.12. The principle has found expression in many opinions of this Court, and

has occupied a central role in the jurisprudence of federal-state relations throughout the history of constitutional adjudication. E.g., Testa v. Katt, 330 U.S. 386, 392-93 (1947); Mondou v. New York, N.H. & Hartford R.R. Co. (Second Employers Liability Act Cases), 223 U.S. 1, 57-58 (1912); Hauenstein v. Lynham, 100 U.S. 483, 490 (1880); Claflin v. Houseman, 93 U.S. 130, 136-37 (1876). One of the most perspicuous statements of this settled rule was provided more than a century ago by the opinion of Justice Bradley for a unanimous Court in Claflin v. Houseman, supra, where he said (93 U.S. at 136-37):

"The laws of the United States are laws of the several States, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State; concurrent as to place and persons, though distinct as to subject-matter."

The decision of the court below in this case plainly violates this basic dogma of American federalism. In the face of this Court's repeated affirmations of this important

principle, there can be no conceivable justification for the court of appeal's holding that a choice-of-law provision adopting "the law of the place where the project is located" should be construed as excluding the application of federal law to a project located within the boundaries of one of the states of the United States. This is the final and most conclusive reason why the decision of the court below is ultimately indefensible and should therefore be summarily reversed in the event this Court should decline to undertake plenary review of this case.

#### CONCLUSION

The issue presented by this case is an important and frequently arising issue which deserves plenary consideration by this Court. The Court should therefore note probable jurisdiction of this appeal and set the case for briefing and argument on the merits. Since the decision of the court below plainly lacks any legal justification, it would also be appropriate for this Court, as an alternative

to plenary review, to enter an order summarily reversing that decision.

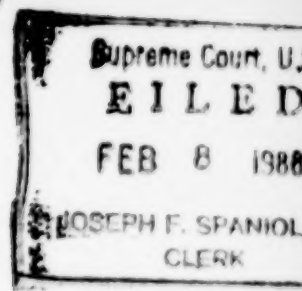
Dated: February 1, 1988

Respectfully submitted,

JAMES E. HARRINGTON  
ROBERT B. THUM  
DEANNE M. TULLY  
PETTIT & MARTIN

Attorneys for Appellant





No. \_\_\_\_\_

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1987

\_\_\_\_\_  
VOLT INFORMATION SCIENCES, INC.,  
Appellant,

vs.

BOARD OF TRUSTEES OF LELAND STANFORD  
JUNIOR UNIVERSITY, Appellee.

\_\_\_\_\_  
ON APPEAL FROM THE  
COURT OF APPEAL OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

\_\_\_\_\_  
APPENDICES TO  
JURISDICTIONAL STATEMENT

JAMES E. HARRINGTON  
(Counsel of Record)  
ROBERT B. THUM  
DEANNE M. TULLY  
PETTIT & MARTIN  
101 CALIFORNIA STREET  
SAN FRANCISCO, CA 94111  
PHONE: (415) 434-4000  
  
COUNSEL FOR APPELLANT

No. \_\_\_\_\_

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

---

VOLT INFORMATION SCIENCES, INC.,  
Appellant,

vs.

BOARD OF TRUSTEES OF LELAND STANFORD  
JUNIOR UNIVERSITY, Appellee.

---

ON APPEAL FROM THE  
COURT OF APPEAL OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

---

APPENDICES TO  
JURISDICTIONAL STATEMENT

JAMES E. HARRINGTON  
(Counsel of Record)  
ROBERT B. THUM  
DEANNE M. TULLY  
PETTIT & MARTIN  
101 CALIFORNIA STREET  
SAN FRANCISCO, CA 94111  
PHONE: (415) 434-4000

COUNSEL FOR APPELLANT

LIST OF CONTENTS

- Appendix A - Opinion and Judgment of the  
California Court of Appeal from  
Which This Appeal Is Taken
- Appendix B - Order of the California Supreme  
Court Denying Appellant's Petition  
for Review
- Appendix C - Order of the State Trial Court  
Denying Appellant's Petition to  
Compel Arbitration
- Appendix D - Appellant's Notice of Appeal
- Appendix E - Excerpts from Appellant's Brief  
in the State Trial Court
- Appendix F - Excerpts from Appellant's Opening  
Brief in the State Court of Appeal
- Appendix G - Excerpts from Appellant's Petition  
for Review in the California  
Supreme Court
- Appendix H - Relevant Statutes and Constitu-  
tional Provisions

APPENDIX A -

OPINION AND JUDGMENT OF  
THE CALIFORNIA COURT OF APPEAL  
FROM WHICH THIS APPEAL IS TAKEN

---

CERTIFIED FOR PUBLICATION

SEE DISSENTING OPINION

FILED  
October 5, 1987  
Richard J. Eyman,  
Clerk

IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

BOARD OF TRUSTEES	)	
OF LELAND STANFORD	)	
JUNIOR UNIVERSITY,	)	
Plaintiff-Respondent,	)	No. H002634
	)	
vs.	)	(Santa Clara
	)	County Super.
VOLT INFORMATION	)	Court P48603)
SCIENCES, INC.,	)	
Defendant-Appellant.	)	
	)	

The Board of Trustees of the Leland Stanford Junior University (Stanford) and Volt Information Sciences, Inc. (Volt) are parties to a written contract under which Volt was to construct a system of electrical conduits throughout the Stanford campus. The contract contains an agreement to arbitrate any disputes arising therefrom. It also contains this language: "The contract shall be governed by the law of the place where the project is



located."

A dispute developed regarding compensation for additional work. Volt submitted a claim which Stanford refused to pay; whereupon Volt served on Stanford a formal demand for arbitration of its claim. Approximately a week later Stanford filed suit in Superior Court. The complaint alleged fraud and breach of contract, inter alia, against Volt and in addition sought indemnity from two companies involved in the design and management of the project. Stanford did not have arbitration agreements with these two firms.

Volt then filed a petition to compel arbitration and to stay prosecution of the lawsuit. Stanford responded with a motion to stay the arbitration pursuant to the terms of Code of Civil Procedure section 1281.2, subdivision (c),<sup>1</sup> on the ground that a lawsuit was pending involving defendants not bound by

---

<sup>1</sup>/ "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it (contd.)

the arbitration agreement. The court denied Volt's petition and granted Stanford's motion under authority of section 1281.2. Volt appeals from that ruling.

The parties agree that their contract involves interstate commerce, and that, generally, the Federal Arbitration Act (the FAA) governs contracts in interstate commerce. There is no provision in the FAA corresponding to Code of Civil Procedure section 1281.2, subdivision (c) which would allow a court to stay arbitration when third not subject to arbitration are involved in the dispute; thus it is apparent that were the federal rules to

---

(footnote contd.) determines that an agreement to arbitrate the controversy exists, unless it determines that: ... [¶] (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common question of law or fact. ... [¶] If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court ... (4) may stay arbitration pending the outcome of the court action or special proceeding."

apply, Volt's petition to compel arbitration would have to be granted. On the other hand, Stanford and Volt have agreed, as we interpret their choice of law provision, that the laws of California, of which section 1281.2 is certainly a part, are to govern their contract. It is Stanford's position that enforcement of the arbitration agreement in accordance with the chosen California rules of procedure does not create a conflict with the federal act, since the purpose of the Act was to ensure that private agreements to arbitrate are enforceable contracts. Moreover, application of the federal rules in this case would force the parties to arbitrate in a manner contrary to their agreement. On balance it is this last point we find persuasive. Accordingly we will affirm the trial court's ruling.

I.

We start with the well-established principle that the interpretation of a written agreement is a legal question unless the interpretation turns upon the credibility of extrinsic evidence. (Estate of Dodge (1971) 6

Cal.3d 311, 318.) There was no extrinsic evidence here and thus no issue of fact. Consequently we are not bound by the trial court's construction but must reach our own determination of the meaning of this provision. (Rooney v. Vermont Investment Corp. (1973) 10 Cal.3d 351, 372.) In this case we agree with the trial judge that by choosing "the law of the place where the project is located," the parties chose to be governed by California law.

The quoted words are a standard choice of law provision contained in an American Institute of Architects document entitled "General Conditions of the Contract for Construction,"<sup>2</sup> intended for use by contracting parties across the nation. It is therefore not remarkable that the particular site of the project in question is not named. We have no doubt that the word "place" was intended to mean the forum state. Courts in other states faced with this identical language have reached the same conclusion we do here. (Lane-Tahoe,

---

<sup>2</sup>/ AIA Document A201, § 7.1.1.

Inc. v. Kindred Construction Company (Nev. 1975) 536 P.2d 491, 493; Eric A. Calstrom Construction v. Independent Sch. Dist. (Minn. 1977) 256 N.W.2d 479, 483; Standard Co., etc. v. Elliott Const. Co., Inc. (La. 1978) 363 So.2d 671.) Likewise, in the California case of Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co. (1983) 140 Cal.App.3d 251, handed down the year before the Stanford-Volt agreement was forged, parties to a construction contract agreed to be governed by the law of the construction site, which the court took to mean California.

We do not find reasonable Volt's interpretation that the "place" where the project is located be construed to mean not only the state of California but also the nation of the United States of America. The question whether the Federal Arbitration Act nonetheless applies by virtue of the fact that the contract is one in interstate commerce is another matter, to which we turn next.

## II.

Volt argues even if the choice of law



provision is taken to mean that California law shall govern, the supremacy clause of the United States Constitution operates to preempt California law because the contract is in interstate commerce. The parties' choice of law insofar as it results in direct conflict with federal law under the provisions of the FAA would thus be rendered void and the federal rule would prevail.

We cannot countenance such a result. At the outset, it is by no means entirely clear that the parties cannot choose to arbitrate under the state rather than the federal statutory scheme. The court in Garden Grove considered this question. "The Federal Arbitration Act by its terms applies to all commercial agreements involving interstate commerce; thus, on the face of it, it would appear federal law controls. However, in this case the parties agreed by contract to be governed by the law of the construction site, California. While California courts have held the Federal Arbitration Act (FAA) applies to California cases involving contracts of

interstate commerce, we have not found any cases applying it where the parties committed to be governed by state law. In the face of such a choice of laws provision, California law applies unless preempted by the FAA." (Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co., supra, 140 Cal.App.3d at p. 262.)

State law is preempted only to the extent that it stands as an obstacle to the accomplishment of the aims of the federal enactment. (Perez v. Campbell (1971) 402 U.S. 637, 644; Waysl, Inc. v. First Boston Corp. (9th Cir. 1987) 813 F.2d 1579.) The FAA was intended to "revers[e] centuries of judicial hostility to arbitration agreements." (Scherk v. Alberto-Culver Co. (1974) 417 U.S. 506, 510 [94 S.Ct. 2449, 2453].) The purpose behind its passage was "to ensure judicial enforcement of privately made agreements to arbitrate. ... The Act ... does not mandate the arbitration of all claims, but merely the enforcement - upon the motion of one of the parties - of privately made arbitration agreements. ... [I]ts purpose was to place an arbitration agreement 'upon the

same footing as other contracts, where it belongs,' ..." (Dean Witter Reynolds, Inc. v. Byrd (1985) 470 U.S. 213, 219 [105 S.Ct. 1238, 1242].)

Bearing this in mind there is little doubt that the FAA preempts state common law under which arbitration agreements are unenforceable. (See, e.g., Episcopal Housing Corp. v. Federal Ins. Co., (S.C. 1977) 239 S.E.2d 647.) It is equally apparent that state statutes which bar the enforcement of arbitration agreements in particular areas of the law must give way to the federal policy. Thus in two recent United States Supreme Court cases<sup>3</sup> California's Franchise Investment Law (Corp. Code, § 31512), and Labor Code section 229, respectively, both of which allow for a judicial forum notwithstanding a valid arbitration agreement, were held to be preempted by the FAA.

It does not follow, however, that the

---

3/ Southland Corp. v. Keating 465 U.S. 1 (1984) and Perry v. Thomas (1987) 482 U.S. \_\_\_, [96 L.Ed.2d 426].

federal law has preclusive effect in a case where the parties have chosen in their agreement to abide by state rules. In fact it would appear that the federal law mandates enforcement of such an agreement according to its terms, since the recognized aim of the Act was to make arbitration agreements "as enforceable as other contracts." (Prima Paint v. Flood & Conklin (1967) 388 U.S. 395, 404, fn. 12.)

The thrust of the federal law is that arbitration is strictly a matter of contract. In this California law is entirely in accord: "Arbitration is ... a matter of contract, and the parties may freely delineate the area of its application." (O'Malley v. Wilshire Oil Co. (1963) 59 Cal.2d 482, 490.) Since "[t]he 'Act does not dictate that we should disregard parties' contractual agreements ... outlining the boundaries of the areas intended to be arbitrable'" (Chan v. Drexel Burnham Lambert, Inc. (1986) 178 Cal.App.3d 632, 640), it follows that the parties are at liberty to choose the terms under which they will

arbitrate, and such a choice will not run afoul of the FAA. Stated another way, the Act does not operate to require the parties to submit to arbitration any dispute which they have not agreed so to submit. (AT&T Tech., Inc. v. Communications Workers (1986) \_\_\_ U.S. \_\_\_, \_\_\_, [106 S.Ct. 1415, 1418].)

If the parties here had expressly stated in their agreement that they wished to arbitrate only those disputes between themselves which did not involve third parties not bound by the arbitration agreement, this provision would presumably be enforceable. In our view they accomplished the same thing by choosing to be governed by California law, thus incorporating the California rules of civil procedure governing arbitration agreements.

Were the federal rules to be imposed in this case to override the parties' choice of law, the effect would be to force the parties to arbitrate where they agreed not to arbitrate. This result is not only inimical to the policies underlying state and federal arbitration law as expressed above, it also



violates basic principles of contract law. Since contractual terms are rarely agreed to without reason, it is assumed that no part of an agreement is superfluous or without effect, but that each term was bargained for. (Rest. Contracts 2d. § 203.) Where a party is deprived of a benefit of his bargain by the operation of law, that party is excused from his duty to perform. (Rest. Contracts §§ 458, 463, 464; 6 Corbin, Contracts (1962) Discharge by Failure of Consideration Either Existing or Prospective, § 1255; 1 Witkin, Summary of Cal. Law (8th ed.) Contracts, Frustration of Purpose § 612, Operation of Law § 607.) Thus even if we were to decide, which we do not, that federal law preempted here, Stanford would be entitled to raise this defense to further performance under the arbitration agreement.

### III.

Shortly before oral argument in this matter the case of Liddington v. The Energy Group, Inc. (1987) 192 Cal.App.3d 1520 was decided by the First District. That case involved a service contract in interstate commerce

containing both an arbitration agreement and also a choice of law provision designating California to be the forum state. The contract further provided that the parties "'shall be deemed to have agreed to binding arbitration in the State of California ...'" (Id., at p. 1523, fn. 3.) When the Liddingtons were sued by a bank for default on a promissory note, they cross-complained against The Energy Group, assignee of the service contract, for failure to install energy systems financed by the bank. The Energy Group then filed a petition to compel arbitration pursuant to the arbitration clause. The trial court stayed arbitration pending the resolution of the litigation, on the basis of Code of Civil Procedure section 1281.2, subdivision (c). On appeal The Energy Group argued that Code of Civil Procedure section 1281.2 was preempted to the extent it was used to stay arbitration proceedings governed by the FAA. The Court of Appeal agreed and reversed.

Despite the striking similarity between this case and ours, we conclude that the

precise question before us was not decided in Liddington. The analysis in Liddington approached the preemption issue from the standpoint of whether the state law in question was a general principle applicable to all contracts, or a rule pertaining exclusively to arbitration contracts. If it was the latter, it would be preempted by the rules contained in the FAA to the extent that they conflicted. In reaching its decision that section 1281.2 fell into this category, the Liddington court relied upon a footnote in the United States Supreme Court case of Perry v. Thomas, supra, 482 U.S. \_\_\_, \_\_\_ [96 L.Ed.2d 426, 437] decided only two weeks earlier. In footnote nine in that case the court said this: "Thus state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement ...."

In Perry the court was faced on the one hand with a private agreement to arbitrate according to state law, and on the other with a state law expressly providing for a judicial forum in spite of the arbitration agreement. State policy was therefore directly at loggerheads with the purposes behind the FAA, and the federal law prevailed to enforce the private agreement. In our case the issue is not whether the state law is one directly affecting the enforceability of arbitration agreements, but rather whether the federal rules can be applied to compel parties to arbitrate contrary to the choice of law in their agreement. Neither Perry nor Liddington addresses this question.

Nor do we find the cases of Moses H. Cone Hospital v. Mercury Constr. Corp. (1983) 460 U.S. 1 [103 S.Ct. 927] or Dean Witter Reynolds, Inc. v. Byrd (1985) 470 U.S. 213 [105 S.Ct. 1238], relied upon by Volt, to be on point here. Both of these cases arose in the context of competing claims in federal and state courts. Neither concerned the enforceability

of a contractual choice of law provision.

IV.

As an additional ground for appeal Volt contends that even if California law were to apply, section 1281.2, subdivision (c) cannot be construed to authorize a stay under the circumstances presented here. Volt argues that application of the statute where Stanford has brought the separate action as a "reactive" response to the demand for arbitration, would amount to giving license to a party to avoid its obligations under an arbitration agreement by simply filing a lawsuit against the party seeking arbitration and joining others not part of the agreement.

As Volt concedes, the language of section 1281.2 is sufficiently broad to encompass the present procedural posture. Moreover the statute does not provide for a stay in every case in which the moving party has filed a separate lawsuit, but rather gives the court discretion to make such a ruling in an appropriate case.

It is well known that a court of review



will not reverse a discretionary ruling in the absence of a clear abuse of discretion.

(Barajas v. USA Petroleum Corp. (1986) 184 Cal.App.3d 974, 989.)

The guidelines for the exercise of discretion here are set forth in the statute itself. The court may grant the stay if it determines that there is a pending court action involving a third party "arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings of law or fact."

Volt claims there is no evidence establishing common issues of law or fact since its demand for arbitration concerned a claim for payment of additional compensation against Stanford alone. In the body of the demand, however, Volt has stated that the changes and additional work it was required to perform were due to a "defective and unsuitable" design and "improper contract administration." Volt does not dispute that the two companies named by Stanford in its complaint were instrumental in the design and management of the project.

Stanford has not merely asserted ancillary claims against unnamed Does in its lawsuit, as was the case in Bos Material Handling, Inc. v. Crown Controls Corp. (1982) 137 Cal.App.3d 99. In that case the court found that this was insufficient to show a third party claim which would create "a possibility of conflicting rulings on a common issue of law or fact." (Code Civ. Proc., § 1281.2, subd. (c).) Rather Stanford has named two parties both closely involved in the management and design of the project, who conceivably could play a role in the present dispute. The possibility of conflicting rulings is readily apparent. Under the circumstances we need go no further than to say we find no abuse of discretion.

The order of the trial court is affirmed.

---

Brauer, J.

I concur:

---

Agliano, P.J.

CAPACCIOLI, J., dissenting:

I respectfully dissent. I find that the majority's analysis is flawed because it is based upon an erroneous premise, namely that the parties chose California arbitration law over federal law by agreeing that the contract would be "... governed by the law of the place where the project is located."

Analytically, it makes no difference in this case whether California and the United States or California alone is the "place." There can be no conflict between federal and state law because a state law is void to the extent it conflicts with federal law under the Supremacy Clause of the United States Constitution and all the states in our republic are bound by the same federal law. (U.S. Const., art. 6, cl. 2; Maryland v. Louisiana (1981) 451 U.S. 725, 746-47 [68 L.Ed.2d 576, 595-96]; Perez v. Campbell (1971) 402 U.S. 637, 649 [29 L.Ed.2d 233, 242].) The Supremacy Clause of the United States Constitution provides: "The Constitution, and the Laws of

the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., art. 6, cl. 2.)

California's Constitution as well as the U.S. Constitution establishes that federal law is paramount: "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land." (Cal. Const., art. 3, § 1.) Furthermore, the California Supreme Court has held that the California courts have a nondiscretionary duty to enforce federal law where they have concurrent jurisdiction. (Gerry of California v. Superior Court (1948) 32 Cal.2d 119, 122; Brown v. Pitchess (1975) 13 Cal.3d 518, 523.) Thus, under California law, federal law governs matters cognizable in California upon which the United States has definitively spoken.

Thus, the parties' choice of law provision,

even assuming arguendo that it must be interpreted as an agreement to have California law govern, does not invariably lead to the conclusion that federal law is inapplicable. To the contrary, where federal law is supreme, California law mandates that federal law controls.

The Federal Arbitration Act requires state and federal courts to enforce any arbitration agreement contained in a contract "evidencing a transaction involving commerce" "... save upon such grounds as exist at law in equity for the revocation of any contract." (See 9 U.S.C., § 2; see Perry v. Thomas (1987) 482 U.S. \_\_\_\_ [96 L.Ed.2d 426, 435-37]; Dean Witter Reynolds, Inc. v. Byrd (1985) 470 U.S. 213, 215-17 [84 L.Ed.2d 158, 161-63, 165]; Southland Corp. v. Keating (1984) 465 U.S. 1, 10-16 [79 L.Ed.2d 1, 12-16].) To the extent California law permits a court to deny or stay arbitration in the face of an unqualified agreement to arbitrate, that law is preempted by the Federal Arbitration Act where a contract "evidencing a transaction involving commerce" is concerned. (Liddington



v. The Energy Group, Inc. (1987) 192 Cal.App.3d 1520, 1525-29; see Perez v. Campbell, supra, 402 U.S. at pp. 644, 649 [29 L.Ed.2d 233, 239, 244]; cf. Perry v. Thomas, supra; Southland Corp. v. Keating, supra.)

While I agree with the majority that the Federal Arbitration Act does not preclude parties from contractually limiting the scope of their arbitration agreement (see Seaboard Coast Line R. Co. v. Trailer Train Co. (1982) 690 F.2d 1343, 1348, 1352; Davis v. Chevy Chase Financial Ltd. (1981) 667 F.2d 160, 165; Alabama Ed. Ass'n. v. Alabama Prof. Staff Organ. (1981) 655 F.2d 607; Lounge-A-Round v. GCM Mills, Inc. (1980) 109 Cal.App.3d 190, 195; cf. United Steelworkers v. Warrior & Gulf Co. (1960) 363 U.S. 574 [4 L.Ed.2d 1409]), the mere choice of California law is not a selection of California law over federal law and does not in any way limit an otherwise unqualified agreement to arbitrate.

The majority concedes that Volt's petition to compel arbitration would have to be granted if the federal law applied. I think there is

no doubt that it does.

I would reverse and remand.

---

Capaccioli, J.

APPENDIX B -

ORDER OF THE CALIFORNIA  
SUPREME COURT DENYING  
APPELLANT'S PETITION FOR REVIEW

---

FILED  
Dec. 17, 1987  
Lawrence P. Gill,  
Clerk

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

6th District, No. H002634

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

IN BANK

---

BOARD OF TRUSTEES OF THE  
LELAND STANFORD JUNIOR UNIVERSITY, Respondent

v.

VOLT INFORM. SCIENCES, INC., Appellant

---

Appellant's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed October 5, 1987, which appears at 195 Cal.App.3d 349. (Cal. Const., Art. VI, sec. 14; Rule 976, Cal. Rules of Court.)

/s/ Malcolm Lucas  
Chief Justice

APPENDIX C -

ORDER OF THE STATE TRIAL  
COURT DENYING APPELLANT'S  
PETITION TO COMPEL ARBITRATION

---



FILED  
Nov. 21, 1986  
Grace Yamakawa  
County Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

BOARD OF TRUSTEES OF THE LELAND )  
STANFORD JUNIOR UNIVERSITY, a )  
body having corporate powers, )

Plaintiff, )

v. )

VOLT INFORMATIONS SCIENCES, )  
INC., TELECOMMUNICATIONS )  
INTERNATIONAL, INC., BRIAN- )  
KANGAS-FOULK & ASSOCIATES, and )  
DOES I through XX, inclusive, )

Defendants. )

No. P48603

ORDER

Plaintiff's motion to stay arbitration is granted and defendant's motion to compel arbitration is denied. The court believes that the principals [sic] enunciated in Garden Grove Community Church vs. Pittsburgh-Des Moines Steel Co., 140 Cal.App.3d 251 and Prestressed Concrete, Inc. v. Adolphson & Peterson, Inc., 240 N.W.2d 551, as well as California Code of

Civil Procedure §1281.2(c) apply in this case.

DATED: November 21, 1986

/s/ Charles Gordon  
CHARLES GORDON  
Judge of the Superior Court

APPENDIX D -

APPELLANT'S  
NOTICE OF APPEAL

---

PETTIT & MARTIN  
JAMES E. HARRINGTON  
ROBERT B. THUM  
DEANNE M. TULLY  
101 California Street  
San Francisco, CA 94111  
Phone: (415) 434-4000

FILED  
Jan. 14, 1988  
Richard J. Eyman  
Clerk

Attorneys for Appellant  
Volt Information Sciences, Inc.

COURT OF APPEAL OF CALIFORNIA

SIXTH APPELLATE DISTRICT

BOARD OF TRUSTEES )  
OF LELAND STANFORD )  
JUNIOR UNIVERSITY, )

Plaintiff-Respondent )

vs. )

VOLT INFORMATION )  
SCIENCES, INC. )

Defendant-Appellant. )  
\_\_\_\_\_ )

No. H002634

NOTICE OF APPEAL  
TO THE SUPREME  
COURT OF THE  
UNITED STATES

On Appeal from the Superior Court  
for the County of Santa Clara,  
Honorable Charles Gordon, Presiding

\_\_\_\_\_

This court having rendered its decision and  
judgment herein on October 5, 1987, affirming  
the order of the trial court denying appel-  
lant's petition to compel arbitration, and the

Supreme Court of California having entered its order herein on December 17, 1987, denying appellant's petition for review, appellant Volt Information Sciences, Inc., hereby appeals to the Supreme Court of the United States, pursuant to the provisions of section 1257(2) of Title 28 of the United States Code, from the aforesaid decision and judgment of this court entered herein on October 5, 1987.

Dated: January 11, 1988

Respectfully submitted,

PETTIT & MARTIN

By /s/ James Harrington  
Attorneys for Appellant



APPENDIX E -  
EXCERPTS FROM  
APPELLANT'S BRIEF  
IN THE STATE TRIAL COURT

---

PETTIT & MARTIN  
 ROBERT B. THUM  
 DEANNE M. TULLY  
 101 California Street,  
 35th Floor  
 San Francisco, California 94111  
 Telephone (415) 434-4000

FILED  
 October 30, 198  
 Grace Yamakawa,  
 County Clerk

Attorneys for Defendant  
 VOLT INFORMATION SCIENCES, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 FOR THE COUNTY OF SANTA CLARA

THE BOARD OF TRUSTEES	)	No. P 48603
OF THE LELAND STANFORD	)	
JUNIOR UNIVERSITY, a body)		MEMORANDUM OF
having corporate powers,	)	POINTS AND
	)	AUTHORITIES IN
Plaintiff,	)	OPPOSITION TO
	)	PLAINTIFF'S
vs.	)	MOTION TO STAY
	)	ARIBITRATION
VOLT INFORMATION	)	AND IN SUPPORT
SCIENCES, INC.,	)	OF DEFENDANT'S
TELECOMMUNICATIONS	)	VOLT INFORMATION
INTERNATIONAL, INC.	)	SCIENCES INC.'S
BRIAN-KANGAS-FOULK &	)	PETITION TO
ASSOCIATES, and DOES I	)	<u>COMPEL ARBITRATION</u>
through XX, inclusive,	)	
	)	
Defendants.	)	
	)	

Defendant Volt Information Sciences,  
 Inc. ("Volt") submits the following Memorandum  
 of Points and Authorities In Opposition to

Plaintiff's Motion To Stay Arbitration and In Support of Volt's Petition to Compel Arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. Section 1, et seq., and the California Arbitration Act, Code of Civil Procedure, Section 1280, et seq.

\* \* \* \*

II. THE FEDERAL ARBITRATION ACT IS APPLICABLE TO ANY CONTRACT INVOLVING INTERSTATE COMMERCE, NOTWITHSTANDING A CHOICE OF LAW PROVISION WITHIN THE CONTRACT AND, THEREFORE, THE ISSUE OF WHETHER TO COMPEL ARBITRATION MUST BE DECIDED ACCORDING TO THE FEDERAL ARBITRATION ACT

The FAA applies to any contract involving interstate commerce. 9 U.S.C. Section 2. It is clear, and Stanford does not contest, that the contract for the construction of the Distribution Conduit System involves interstate commerce. (See Affidavit of Eugene F. Curran.) Rather, Stanford contends that the choice of law provision within the contract somehow nullifies the application of the FAA and requires the Court to rely on California law. In so contending, however, Stanford

ignores one of the most fundamental concepts in American law.

A. THE FEDERAL ARBITRATION ACT IS THE SUPREME LAW OF THE LAND

It is well settled that Congress has the authority to regulate interstate commerce under the Commerce Clause of the United States Constitution. Gibbons v. Ogden. 22 U.S. 1, 196 (1824). The FAA rests on the authority of Congress to enact substantive rules under the Commerce Clause.

In the leading case of Prima Paint Corp. v. Flood and Conklin, 388 U.S. 395 (1967), a federal district court applied federal substantive law in determining whether an arbitration agreement had been fraudulently induced. The United States Supreme Court, in considering whether the district court's holding was constitutionally permissible under the Erie Doctrine (Erie R.R. Co v. Tompkins, 304 U.S. 64 (1938)) stated:

The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases. [citation.] Rather, the

question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has the power to legislate. The answer to that can only be in the affirmative. And it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of control over interstate commerce and over admiralty.

Prima Paint at 405.

Whereas the court in Prima Paint did not specifically address a choice of law clause, it plainly implied that the substantive law of the FAA was applicable both in federal and state courts. In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983), the United States Supreme Court reaffirmed the Prima Paint holding that the FAA created a substantive body of law and expressly held that the FAA was applicable in state courts as well as federal courts. Id. at 24.

Moreover, in Southland Corp. v. Keating, \_\_\_\_ U.S. \_\_\_\_, 104 S.Ct. 852 (1984), the Supreme Court held that the FAA applied to any arbitration provision in a contract evidencing interstate commerce. The Court



ruled that state courts are required to apply the FAA, and to the extent state law conflicts with the FAA, it is preempted under the Supremacy Clause in Article VI of the United States Constitution. In so ruling the United States Supreme Court overruled the California Supreme Court's holding in Keating v. Southland Corp., 31 Cal.3d 584 (1982).

In Keating v. Southland Corp., plaintiff, the franchisee of a 7-Eleven convenience store, sued Southland Corp. ("Southland"), the owner and franchiser of the stores, for various violations of the California Franchise Investment Law, Corporations Code Section 31000, et seq. Pursuant to an arbitration provision in all franchise contracts, Southland sought arbitration of plaintiff's claims according to the provisions of the FAA. The California court ruled that arbitration of the claims was precluded by Corporations Code Section 31512, which states that contractual provisions waiving application of the California franchise law are void. The California court went on to

state that the strong policy to protect California franchisees, as evidenced by Corporations Code Section 31512 did not conflict with the principles of arbitration embodied in the FAA.

The United States Supreme Court expressly overruled the California Supreme Court's holding. Writing for the majority, Chief Justice Burger stated:

In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. Southland Corp. v. Keating, supra, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S.Ct. at 861.

To the extent that any California law could be interpreted as preventing enforcement of or interfering with the arbitration agreement, it violated the Supremacy Clause and is null and void. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., supra, 460 U.S. 1, 24.

B. INSERTION OF A CHOICE OF LAW PROVISION DOES NOT AFFECT THE APPLICABILITY OF THE FAA

Once it has been determined that a contract involves interstate commerce, the FAA will apply notwithstanding the insertion of a choice of law provision in the contract. Commonwealth Edison Co. v. The Gulf Oil Corp., 541 F.2d 1263 (7th Cir. 1973). In Commonwealth, the parties included both an arbitration provision and a choice of law provision in their contract. After defendant terminated the contract, plaintiff sought to compel defendant to arbitrate controversies related to that termination. The district court refused to apply state law and ordered defendant to arbitration. The court of appeals affirmed the district court and held that notwithstanding the inclusion of a choice of law provision, the FAA rather than state law governs any arbitration contract involving interstate commerce. The court stated:

Congress, in enacting the Federal Arbitration Act, exercised its power over admiralty and interstate commerce. Any arbitration contract involving one of those areas is governed by the Federal Act. To permit the parties to contract away the application of the Act by adopting state law to govern their

agreement would be inconsistent with the Act itself and the holding in Prima Paint. Id. at 1269.

Since the FAA applies in state courts as well as federal, it requires state courts to enforce the arbitration agreement despite contrary state law or policy. R.J. Palmer Construction Co., Inc. v. Wichita Band Instrument Co., Inc., 642 P.2d 127 (Kan. 1982), Allison v. Medicab Intern, Inc., 597 P.2d 380 (Wash. 1979), Communications Workers of America v. Pacific Telephone & Telegraph Co., 462 F.Supp. 736 (C.D. Cal. 1978) Main v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 67 Cal.App.3d 19 (1977).

Stanford relies on Garden Grove Community Church v. Pittsburg-Des Moines Steel Co., 140 Cal.App.3d 251 (1983) as support for its contention that by inserting a choice of law provision in the contract, the FAA cannot apply. Stanford's analysis of this case is misleading and incomplete.

In Garden Grove, the parties agreed to be governed by the law of the construction site, in this case California. The Court stated:

While California courts have held the FAA applies to California cases involving contracts of interstate commerce, we have not found any cases applying it where the parties committed to be governed by state law. In the face of such a choice of law provision, California law applies unless preempted by the FAA.  
[Emphasis added.]

Id. at 262.

The Court in Garden Grove was addressing the issue of consolidating several arbitrations into one arbitration. On this specific issue, the FAA and the California Arbitration Act are substantially similar. The Court recognized this. Therefore, the Court held that on the consolidation issue, the FAA neither preempted nor conflicted with the equivalent California statute.

The provisions of California Code of Civil Procedure Section 1281.2(c), however, directly conflict with the principles embodied in the FAA. Section 1281.2(c) states that a



court need not compel arbitration if a party to an arbitration agreement is also a party to a pending lawsuit with a third party and there is a possibility of conflicting rulings. This provision is completely contradictory to case law interpreting the FAA. Under the FAA, arbitration must be compelled even in the presence of third party defendants. As the United States Supreme Court held in Dean Witter Reynolds, Inc. v. Byrd, 105 S.Ct. 1238 (1985):

The act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the results would be the possibly inefficient maintenance of separate proceedings in different forums. [Emphasis added.]

Id. at 1241.

Moreover, the Garden Grove decision contains no discussion whatsoever of federal preemption principles and the court cites no authority for reaching its conclusion. Garden Grove was decided prior to the United States Supreme Court's holdings in Moses M. Cone Memorial Hospital v. Mercury Construction Corp., supra, 460 U.S. 1 and Southland Corp. v.

Keating, supra, \_\_\_\_ U.S. \_\_\_\_, 104 S.Ct. 852. Clearly, then, Garden Grove has been explicitly overruled.

Finally, Paragraph 7.1.1 of the General Conditions does not specifically state California law will apply. It states the law of the place shall apply. In this case, the applicable law of the place is federal. California courts have long recognized that where federal law is supreme, they are required to apply that federal law.

III. UNDER THE PRINCIPLES EMBODIED IN THE  
FEDERAL ARBITRATION ACT, THE COURT  
MUST ENFORCE THE ARBITRATION  
PROVISION

The Supreme Court's holding in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., supra. 460 U.S. 1, was based on facts almost identical to those in the present case.

In Moses H. Cone, the hospital entered into a contract with Mercury Construction Corp. ("Mercury") for the construction of an additional hospital wing. The hospital drafted and inserted in the

contract an arbitration provision, the terms of which are nearly identical to the language in the arbitration provision drafted by Stanford here. The hospital did not include an arbitration provision in its separate contract with the architect for the project. A dispute arose regarding Mercury's claim for additional compensation due to the hospital's errors and omissions during the course of construction. The same day Mercury filed a Demand for Arbitration, the Hospital filed and served a complaint, naming both Mercury and the architect as defendants. The hospital's claim against the architect was for declaratory relief of entitlement to indemnity should the hospital be found liable to Mercury. The hospital claimed the dispute could not go to arbitration because the architect could not be compelled to participate, and this would necessarily result in piecemeal litigation. The Supreme Court held:

It is true, therefore, that if Mercury obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That

misfortune, however, is not the result of any choice between the federal and state courts; it occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement. Id. at 20. [Emphasis added.]

The Court ordered the parties to arbitration.

The Supreme Court's clear holding that arbitration agreements must be enforced even if this results in piecemeal litigation has been emphatically endorsed by subsequent decisions. In Southland Corp. v. Keating, supra, \_\_\_\_ U.S. \_\_\_\_, 104 S.Ct. 852 the court held that

Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate. Id. at 856.

And, in Dean Witter Reynolds, Inc. v. Byrd, supra, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 1238, the court emphasized the mandatory nature of the court's obligation to enforce arbitration even if it results in the "possibly inefficient

maintenance of separate proceedings in different forums." Id. at 1241.

The plain mandate from the United States Supreme Court is that the FAA applies to all contracts arising out of interstate commerce. Under the FAA, a court is required to enforce an arbitration agreement even if this results in piecemeal litigation.

Significantly, in its opposition to Volt's Petition, Stanford has not even attempted to discuss, much less dispute, the Supreme Court's decrees in *Moses H. Cone, Southland Corp.* and *Dean Witter*. Any such attempt would, if made, of course be futile.

IV. EVEN IF FEDERAL LAW DID NOT APPLY, CALIFORNIA LAW OVERWHELMINGLY SUPPORTS ARBITRATION OF THIS DISPUTE

\* \* \* \*

VI. CONCLUSION

Under both the Federal Arbitration Act and the California Arbitration Act, the Court is required to enforce valid arbitration agreements. Such an arbitration agreement is present in this case. The fact that Stanford has chosen to pursue additional claims against



third party defendants does not affect the arbitrability of the dispute between Stanford and Volt. Consequently, the Court should compel Stanford to arbitrate its dispute with Volt and stay the action pending the outcome of the arbitration.

DATED: October 30, 1986.

PETTIT & MARTIN

BY: \_\_\_\_\_

Deanne M. Tully  
Attorneys for Defendant  
VOLT INFORMATION SCIENCES, INC.

APPENDIX F -

EXCERPTS FROM APPELLANT'S  
OPENING BRIEF IN THE  
STATE COURT OF APPEAL

---

PETTIT & MARTIN  
JAMES E. HARRINGTON  
ROBERT B. THUM  
DEANNE M. TULLY  
101 California Street  
San Francisco, CA 94111  
(415) 434-4000

FILED  
Jan. 13, 1987  
Richard J. Eyman  
Clerk

Attorneys for Defendant  
and Appellant  
Volt Information Sciences, Inc.

COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

BOARD OF TRUSTEES  
OF LELAND STANFORD  
JUNIOR UNIVERSITY,  
Plaintiff-Respondent,

vs.

VOLT INFORMATION  
SCIENCES, INC.,  
Defendant-Appellant.

No. H002634

Appeal from the Superior Court  
for the County of Santa Clara  
Honorable Charles Gordon, Judge

OPENING BRIEF  
OF DEFENDANT AND APPELLANT  
VOLT INFORMATION SCIENCES, INC.

## TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF THE CASE	2
ARGUMENT	6
I. Certain Basic Propositions Are Beyond Controversy - Namely, (1) That the Federal Arbitration Act Generally Governs the Arbitra- bility of All Disputes Involving Interstate Commerce and to That Extent Preempts Any Conflicting Provisions of State Law, (2) That the Present Dispute Involves Inter- state Commerce and Would Therefore Be Governed by the Federal Arbitra- tion Act in the Absence of a Valid Choice-of-Law Clause in the Parties' Contract Specifying Some Other Body of Law to Govern Application of Their Agreement, and (3) That Application of the Federal Arbitration Act to This Case Would Require Reversal of the Superior Court's Order.	6
A. The General Coverage of the Federal Arbitration Act	6
B. The Applicability of the Act to This Case	8
C. The Result That Would Be Dictated by the Act	10
D. Conclusion	14
II. For Each of Three Independently Sufficient Reasons, the Clause of the Parties' Contract Specifying That It "Shall Be Governed by the Law of the Place Where the Project Is Located" Must Be Interpreted to Permit, Indeed to Require, Resolu- tion of This Controversy in Exclu-	15

sive Accordance with the Dictates of the Federal Arbitration Act.

A. The Literal Terms of the Contractual Provision	15
B. The Dictates of Federalism	18
C. The Legal Invalidity of a Contrary Interpretation	21
D. The Two Decisions Espousing a Minority View	22
E. Conclusion	25
III. In Any Event, Even if This Controversy Were to Be Resolved In Accordance With State Law, Reversal of the Superior Court's Order Would Still Be Required Because C.C.P. §1281.2(c) Does Not Authorize the Type of Stay Order Entered by the Court in the Circumstances Presented Here.	25

CONCLUSION

37



## INTRODUCTION

This is an appeal, pursuant to C.C.P. §1294(a), from an order of the superior court denying appellant's petition to compel arbitration of a dispute between the parties pursuant to the terms of an arbitration clause in their agreement. By the same order, the court granted a cross-motion by respondent to stay any such arbitration pending the outcome of a law suit that had been commenced by respondent against appellant and certain third persons arising out of the same transaction that was the subject of the arbitration. The court's order was entered pursuant to C.C.P. §1281.2(c), which permits a superior court, under certain conditions, to deny a petition to compel arbitration or to stay a pending arbitration when the dispute sought to be arbitrated is the subject of pending litigation between the parties in which claims are also asserted against third persons who are not parties to the arbitration agreement.

The primary issue presented by this appeal is whether the provisions of C.C.P. §1281.2(c)

have any application whatever to the present controversy, or whether, on the other hand, the question of arbitrability of this interstate contract dispute should have been determined by exclusive reference to the terms of the Federal Arbitration Act, 9 U.S.C. §§1 et seq., which have been specifically held to require arbitration and to preclude entry of a stay order under precisely the conditions that are presented here. The superior court's refusal to apply the federal statute in this case was apparently based on a clause in the parties' contract providing that "[t]he Contract shall be governed by the law of the place where the project is located," which the court evidently interpreted to require resolution of the issue of arbitrability solely in accordance with California statutory law. Appellant contends that the court erred in this regard, because the term "the law of the place where the project is located" must be construed to include, not only California law, but also the laws of the United States, including the Federal Arbitration Act and the Supremacy

Clause of the United States Constitution. Alternatively, appellant contends that, even if California law were to to be applied here, reversal of the court's order would still be required because, under a proper construction of C.C.P. §1281.2(c), that statute would not afford any justification for the entry of an order staying the arbitration in the particular circumstances of this case.

\*\*\*\*

#### ARGUMENT

I. Certain Basic Propositions Are Beyond Controversy - Namely, (1) That the Federal Arbitration Act Generally Governs the Arbitrability of All Disputes Involving Interstate Commerce and to That Extent Preempts Any Conflicting Provisions of State Law, (2) That the Present Dispute Involves Interstate Commerce and Would Therefore Be Governed by the Federal Arbitration Act in the Absence of a Valid Choice-of-Law Clause in the Parties' Contract Specifying Some Other Body of Law to Govern Application of Their Agreement, and (3) That Application of the Federal Arbitration Act to This Case Would Require Reversal of the Superior Court's Order.

#### A. The General Coverage of the Federal Arbitration Act

Section 2 of the Federal Arbitration Act states that the Act governs the application and

enforcement of any "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." 9 U.S.C. §2. The term "commerce" is earlier defined to mean "commerce among the several states." Id. §1. The Act then goes on to declare the validity and enforceability of all such arbitration provisions and to prescribe certain procedures for their enforcement by the courts. Id. §§2-4. Although some of the remedial provisions of the Act refer to actions brought in the federal district courts (id. §4), it has now become well settled that the Act was intended to create a comprehensive body of substantive law governing all arbitrations arising out of interstate transactions, and that its provisions are therefore required to be enforced in state courts, as well as federal courts, to the exclusion of any conflicting provisions of state law. Southland Corp. v. Keating, 465 U.S. 1, 12 (1984); Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S.

1, 24, 26 (1983); Communication Workers of Amer. v. Pac. Tel. & Tel. Co., 462 F.Supp. 736, 739 (C.D.Cal. 1978); Ford v. Shearson Lehman Amer. Express, Inc., 180 Cal.App.3d 1011, 1017-18 (1986); Lewis v. Prudential Bache Securities, Inc., 179 Cal.App.3d 935, 941 (1986); \*\*\* As the United States Supreme Court recently stated in its opinion in Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, the Act "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act ... [which] governs that issue in either state or federal court ... notwithstanding any state substantive or procedural policies to the contrary." Id., 460 U.S. at 24. The principles thus summarized by the Court are by now quite familiar and uncontroversial, and apparently are not disputed by Stanford in this case (see JA 225-27)

B. The Applicability of the Act to This Case

Equally beyond dispute is the proposition that the arbitration agreement at issue in this



case "evidenc[es] a transaction involving ... commerce among the several states" within the meaning of the Federal Arbitration Act, and that it therefore falls within the overall coverage of the Act. 9 U.S.C. §§1-2. Volt established by an uncontradicted affidavit in the court below that all of its supervisory personnel and much of its work force for the Stanford project were transferred to California from other states for the exclusive purpose of participating in that project, that a large proportion of the equipment and material used on the project was shipped from other states, and that overall administration of the project was conducted from Volt's offices outside California (JA 207-8). Under the standards enunciated in numerous prior decisions on this issue, these facts clearly establish a sufficient nexus with interstate commerce to bring this transaction well within the scope of the federal Act. E.g., Prima Paint Corp. v. Flood & Conklin, supra, 388 U.S. at 401; Mesa Operating Ltd. P'ship. v. Louisiana Intrastate Gas Corp., 797 F.2d 238, 243 (5th Cir. 1986);

In re Mercury Constr. Corp., 656 F.2d 933, 942 (4th Cir. 1981), affd. sub nom. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); \*\*\* It follows that, in the absence of a valid choice-of-law provision in the parties' contract selecting some other body of law to govern the application of their agreement, the question of arbitrability of the present dispute would have to be resolved in exclusive accordance with federal law. Once again, this conclusion is apparently not seriously questioned by Stanford (see JA 225-27).

C. The Result That Would Be Dictated by the Act

Finally, there is no disagreement that, if federal law does indeed govern the resolution of this controversy, its application will necessarily require reversal of the order of the superior court denying Volt's petition to compel arbitration and granting Stanford's motion to stay the arbitration pending the judicial resolution of its claims against the project designers. As noted earlier, the sole basis of the court's order was the provision of

C.C.P. §1281.2(c) that authorizes a stay of arbitration where non-arbitrable claims arising out of the same transaction have been asserted against third parties in a pending law suit. The Federal Arbitration Act contains no counterpart provision authorizing a stay of arbitration in these circumstances, and, indeed, the decisions applying the Act have repeatedly held that the existence of such non-arbitrable third-party claims does not afford a proper ground for denying enforcement of an otherwise valid arbitration agreement or for delaying the commencement of arbitration of an otherwise ripe dispute between the parties to the agreement. E.g., Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, 460 U.S. at 20; C. Itoh & Co. (America), Inc. v. Jordan Intl. Co., 552 F.2d 1228, 1231 (7th Cir. 1977); Acevedo Maldonado v. PPG Industries, Inc., 514 F.2d 614, 617 (1st Cir. 1975); \*\*\* See Dean Witter Reynolds, Inc. v. Byrd, \_\_\_ U.S. \_\_\_, 105 S.Ct. 1238, 1242-43 (1985). \*\*\* Since this settled federal rule would directly preempt the contrary prescription of C.C.P. §1281.2(c), and

would thus invalidate the stay order entered by the superior court in reliance upon that statute in this case, it necessarily follows that reversal of the court's order will be required if and to the extent that the Federal Arbitration Act is found to govern the disposition of this case. Stanford, once again, has not disputed this conclusion (see JA 225-27, RT 20-22).

\*\*\*

D. Conclusion

It has thus been demonstrated (1) that the Federal Arbitration Act governs the enforcement of all arbitration agreements covered by its terms in both state and federal courts, and to that extent preempts any state laws that prescribe any different method of enforcement, (2) that the agreement at issue in this case falls within the scope of the Act and would therefore be governed by the terms of the Act in the absence of a valid choice-of-law clause in the parties' contract prescribing some other body of law to govern the application of their agreement, and (3) that, if the disposition of

the present case is indeed governed by the Federal Arbitration Act, the superior court's order staying the arbitration of Volt's dispute with Stanford will have to be reversed, because the Act precludes the entry of such a stay order in the circumstances presented here. All of these propositions are free from any genuine dispute. Thus, the only remaining issue that needs to be addressed - and the only issue that has been seriously contested by Stanford - is whether the clause in the parties' agreement specifying that "[t]he Contract shall be governed by the law of the place where the project is located" effectively precludes the application of federal law to this case and hence permitted the superior court to resolve the controversy in exclusive accordance with California statutory law and in disregard of the dictates of the Federal Arbitration Act. That issue is discussed in the next section.

//

//

//

//



II. For Each of Three Independently Sufficient Reasons, the Clause of the Parties' Contract Specifying That It "Shall Be Governed by the Law of the Place Where the Project Is Located" Must Be Interpreted to Permit, Indeed to Require, Resolution of This Controversy in Exclusive Accordance with the Dictates of the Federal Arbitration Act.

As recited earlier, the provision of the parties' contract requiring its application in accordance with "the law of the place where the project is located" was apparently interpreted by the superior court as an exclusive reference to California statutory law and as a consequent mandate to ignore the prescriptions of the Federal Arbitration Act in ruling upon Volt's petition and Stanford's motion to stay the arbitration (RT 13-14; JA 252-53). As will now be demonstrated, this interpretation of the quoted provision of the contract was erroneous. For at least three independently sufficient reasons, each of which is supported by ample authority, the contractual reference to "the law of the place where the project is located" must be deemed to include federal law as well as California law and hence to require resolution of this dispute in accordance with

the otherwise clearly applicable terms of the Federal Arbitration Act.

A. The Literal Terms of the Contractual Provision

This conclusion is dictated, first of all, by the literal language of the contractual provision itself. The words, "the place where the project is located," literally refer, not only to the State of California, but also to the City of Palo Alto, the County of Santa Clara, and the nation of the United States of America. All of these political entities have laws, ordinances, and constitutional provisions that were applicable in one way or another to the activities occurring during the performance of the parties' contract. The literal words of the contractual provision therefore afford no basis whatsoever for choosing the laws of only one of these entities, to the exclusion of all of the others, as constituting "the law of the place where the project is located." To the contrary, the only literally proper interpretation of that phrase is that it refers collectively to all of the laws of all these

political entities within whose boundaries the project site was situated. Under that interpretation, the term encompasses, not only the statutory law of California, but also the statutes of the United States, including the Federal Arbitration Act. Moreover, it encompasses the Supremacy Clause of the United States Constitution, which generally dictates that federal law takes precedence over state law in the event of overlapping coverage of the same subject matter, and which specifically dictates that the Federal Arbitration Act preempts any state law, including C.C.P. §1281.2(c), that purports to impose restrictions on the enforcement of arbitration agreements of a kind not authorized by the federal Act. See cases cited at page 7, supra. The conclusion is unavoidable that, by its clear literal terms, the contractual provision mandating application of the contract in accordance with "the law of the place where the project is located," not only does not preclude, but specifically compels reliance upon the Federal Arbitration Act to determine

the arbitrability of disputes arising under the agreement at issue in this case, and that the trial court's ruling to the contrary was erroneous.

\*\*\*

B. The Dictates of Federalism

Secondly, the same result would follow even if the choice-of-law clause in the agreement at issue here had explicitly and exclusively adopted "the law of California," rather than merely "the law of the place where the project is located," to govern the application of its provisions. For it is basic to the nature of our federal union, and inherent in the notion of federal primacy expressed in the Supremacy Clause, that the law of California, as of every other state, includes the laws of the United States, and that every federal enactment, in that sense, constitutes a law of each state to the same extent as if it had been passed by the state's own legislature. See *The Federalist*, Nos. 16, 27. This fundamental tenet of American federalism has found frequent expression in the opinions of the Supreme

Courts of both the United States and of California. E.g., Testa v. Katt, 330 U.S. 386, 392-93 (1947); Mondou v. New York, New Haven & Hartford R.R. Co. (Second Employers' Liability Act Cases), 223 U.S. 1, 57-58 (1912); Claflin v. Houseman, 93 U.S. 130, 136-37 (1876); Gerry of California v. Superior Court, 32 Cal.2d 119, 122 (1948); Estate of Lundquist, 25 Cal.2d 697, 704-5 (1944); Leet v. Union Pac. R.R. Co., 25 Cal.2d 605, 612 (1944); Miller v. Municipal Court, 22 Cal.2d 818, 848, 850 (1943). Thus, for example, in Mondou v. New York, New Haven & Hartford R.R. Co., supra, in the course of reversing a decision of the Connecticut Supreme Court that the Federal Employers' Liability Act was unenforceable on "public policy" grounds in the courts of that state, Justice Van Devanter, stated for a unanimous United States Supreme Court (id., 223 U.S. at 57; emphasis added):

"When Congress, in the exertion of the power confided in it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the Act had emanated from its own legislature, and should be respected accordingly in the courts of the state. As was said by this court in Claflin



v. Houseman, 93 U.S. 130, 136, 137, 23 L.Ed. 833, 838, 839: '... The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state. ...'"

This passage from the Mondou opinion was later quoted and relied upon by the Supreme Court of this state in Miller v. Municipal Court, supra, where the Court issued a writ of mandate to compel the respondent municipal court to entertain an action brought under the Federal Emergency Price Control Act notwithstanding the contention that the Act was "penal" in nature and hence unenforceable in the California state courts. Id., 22 Cal.2d at 848. Besides quoting from the opinion in Mondou, the California Supreme Court justified its issuance of the writ in that case by the additional observation that "[t]he legislation of Congress is a portion of the law of each State" and is accordingly entitled to enforcement as such in the courts of California. Id. at 850.

The basic principle enunciated in these opinions has been specifically invoked in at least two decisions to sustain the enforcement of the Federal Arbitration Act in the face of a contention that its enforcement was precluded by a clause in the arbitration agreement expressly stating that it was to be applied in accordance with the law of a particular state. Thus, in Mamlin v. Susan Thomas, Inc., supra, the Texas Court of Civil Appeals held that the Federal Arbitration Act governed the issue of the arbitrability of the parties' dispute despite a provision in their agreement requiring that this issue be resolved "in accordance with the then current arbitration rules of the American Arbitration Association and the laws of the State of New York." Id., 490 S.W.2d at 636. In support of its holding to this effect, the court stated simply that "[t]he Federal Arbitration Act is the law of New York and also the law of Texas with respect to any 'contract evidencing a transaction involving commerce,'" and that application of its terms to the instant dispute was accord-

ingly consistent with the choice-of-law provision of the parties' agreement. Id., 490 S.W.2d at 637. This passage from the Mamlin opinion was subsequently quoted and relied upon as one of several alternative grounds for reaching the same result in Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263 (7th Cir. 1976), where the court held that arbitrability of the parties' dispute should be determined under the Federal Arbitration Act despite the presence in their agreement of a provision requiring that application of the agreement "shall be determined and governed by the law of the State of Illinois." Id., 541 F.2d at 1266, 1270. Thus, these decisions and the basic principle of federalism upon which they rely provide yet a second, independently sufficient reason why the choice-of-law clause in the agreement at issue in this case cannot be deemed to preclude the application of the Federal Arbitration Act to resolve the present controversy.

//

//

C. The Legal Invalidity of a Contrary Interpretation

Finally, a third alternative justification for this conclusion is furnished by a substantial number of decisions which hold that the parties to an arbitration agreement involving interstate commerce are not free to exempt themselves from the coverage of the Federal Arbitration Act by designating some other body of law to govern their agreement, and that any choice-of-law clause that attempts to accomplish that result is to that extent invalid. The leading decision to this effect is the ruling of the federal court of appeals in Commonwealth Edison Co. v. Gulf Oil Corp., supra, \*\*\* The holding in Commonwealth Edison has been followed in several subsequent decisions which similarly hold that the Federal Arbitration Act effectively invalidates any choice-of-law clause in an arbitration agreement that purports to preclude the application of federal law to the agreement, particularly where this would have the effect of preventing the enforcement of a promise to

arbitrate that would have been enforceable under the federal Act. E.g., Mesa Operating Ltd. P'ship. v. Louisiana Intrastate Gas Comm., supra, 797 F.2d at 243-44; Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., supra, 625 F.2d at 25n.8; Paul Allison, Inc. v. Minikin Storage of Omaha, Inc., supra, 486 F.Supp. at 3; Cone Mills Corp. v. August F. Nielsen Co., 455 N.Y.S.2d 625, 627 (N.Y.App. 1982). Thus, these decisions establish that the choice-of-law provision at issue in this case would not be effective to prevent the application of the Federal Arbitration Act to this dispute even if it had provided in so many words, which it clearly does not, that California law should govern the resolution of the dispute to the complete exclusion of the federal Act.

D. The Two Decisions Espousing a Minority View

The foregoing discussion demonstrates that there are at least a dozen decisions holding, on one rationale or another, that the type of choice-of-law clause that appears in the



parties' contract in this case cannot be deemed to foreclose the application of the Federal Arbitration Act to determine the arbitrability of a dispute arising under the contract.

Arrayed against this overwhelming body of authority are two decisions which have reached a contrary result, holding that such a choice-of-law clause is indeed effective to preclude reliance on the Act to resolve the issue of arbitrability. Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., 140 Cal.App.3d 251 (1983); Standard Co. of New Orleans v. Elliott Constr. Co., 363 So.2d 671 (La. 1978).

One of these decisions, a ruling of the California Court of Appeal for the Fourth District, was expressly relied upon by the trial court to support its refusal to follow the Federal Arbitration Act in adjudicating the present controversy (JA 252). Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., supra.

\*\*\*

Although the holdings in these two cases are thus clearly distinguishable, Volt submits,

nevertheless, that the more correct and forthright disposition of these decisions would be simply to acknowledge that both of them were wrongly decided with respect to the issue presented here. For reasons already reviewed at length above, a clause in a contract which merely specifies that the contract is to be governed by the law of the place of performance simply cannot be interpreted, either literally or consistently with the character of our federal system, to preclude the application of otherwise applicable federal statutes. To the extent these decisions adopt such an interpretation of this type of clause, they are wrong and should not be followed by this court.

E. Conclusion

The discussion in this section has demonstrated that, for at least three compelling reasons, the choice-of-law provision in the contract between Volt and Stanford presents no obstacle to the application of the Federal Arbitration Act to this case. Indeed, it has been shown that, if anything, the application of the Act in this context is

affirmatively required by the terms of that provision. Since it has also been demonstrated, in the preceding section, that the Federal Arbitration Act, if applicable to this case, would mandate immediate arbitration of the parties' current dispute and prohibit any stay of the arbitration pending the outcome of Stanford's law suit, it follows that the trial court erred in ordering such a stay and in denying Volt's motion to compel Stanford to proceed with the arbitration.

III. In Any Event, Even if This Controversy Were to Be Resolved in Accordance with State Law, Reversal of the Superior Court's Order Would Still Be Required Because C.C.P. §1281.2(c) Does Not Authorize the Type of Stay Order Entered by the Court in the Circumstances Presented Here.

---

\*\*\*

#### CONCLUSION

The foregoing discussion has demonstrated that the Federal Arbitration Act governs the issue of arbitrability of the interstate contract dispute that is at issue in this case, and that the superior court's ruling to the contrary was therefore erroneous. It has also

been demonstrated that the Act specifically forbids a trial court from refusing to order arbitration on the ground that non-arbitrable claims arising out of the same transaction have been asserted against third parties in a pending law suit, and that the superior court therefore further erred in refusing to order arbitration on that ground in this case. Finally, it has been shown that, even if the case were to be resolved under state law, the superior court's order would still be improper because a reasonable application of the terms of C.C.P. §1281.2(c) would not authorize such an order in the circumstances that are presented here. For all of these reasons, it is submitted that the order of the superior court denying Volt's petition to compel arbitration and granting Stanford's motion to stay the arbitration should be reversed. The mandate accompanying the reversal should include a direction to the superior court to enter a new order requiring the immediate arbitration of Volt's claim against Stanford and staying the prosecution of Stanford's

pending action against Volt until that  
arbitration has been completed.

Dated: January 13, 1987

Respectfully submitted,

PETTIT & MARTIN  
JAMES E. HARRINGTON  
ROBERT B. THUM  
DEANNE M. TULLY

Attorneys for Appellant  
Volt Information  
Sciences, Inc.



APPENDIX G -

EXCERPTS FROM APPELLANT'S  
PETITION FOR REVIEW IN  
THE CALIFORNIA SUPREME COURT

---

PETTIT & MARTIN  
JAMES E. HARRINGTON  
ROBERT B. THUM  
DEANNE M. TULLY  
101 California Street  
San Francisco, CA 94111  
(415) 434-4000

FILED  
Nov. 12, 1987  
Lawrence P. Gill  
Clerk

Attorneys for Petitioner  
and Appellant  
Volt Information Sciences, Inc.

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

BOARD OF TRUSTEES	)	
OF LELAND STANFORD	)	
JUNIOR UNIVERSITY,	)	
Plaintiff-Respondent,	)	No. S003107
	)	
vs.	)	Court of Appeal
	)	No. H002634
VOLT INFORMATION	)	
SCIENCES, INC.,	)	
Defendant-Appellant.	)	

---

Appeal from the Superior Court  
for the County of Santa Clara  
Honorable Charles Gordon, Judge

PETITION FOR REVIEW

## TABLE OF CONTENTS

ISSUES PRESENTED	1
INTRODUCTORY SUMMARY	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING REVIEW	7
I. There Is No Serious Dispute That, Unless the Choice-of-Law Clause Were Found to Require a Different Result, Federal Law Would Govern the Disposition of This Case and Would Dictate That Volt's Petition to Compel Arbitration Should Be Granted.	7
II. The Decision of the Court of Appeal on the Effect of the Choice-of-Law Clause Is in Clear Conflict with the Decisions of Other California Courts of Appeal, as Well as the Virtually Unanimous Decisions of the Courts in Other Jurisdictions.	11
A. The Decision of the First District in the Liddington Case	11
B. The Decision of the Fourth District in the Garden Grove Case	14
C. The Decision of the Second District in the Ford Case	17
D. The Numerous and Virtually Unanimous Contrary Decisions of the Courts of Other Jurisdictions	18
III. The Issue Presented Here Is of Substantial Importance, Both Because It Is Likely to Arise with Great Frequency and Because Its Proper Resolution Will Determine the Ultimate Enforceability	21

of Arbitration Agreements in Precisely Those Categories of Transactions in Which Arbitration Is Most Commonly Utilized as a Means of Settling Disputes.

IV. The Opinion of the Court of Appeal Reflects a Wholly Unsatisfactory Resolution of the Question Presented Here, in Both Its General Aspect and in the Context of the Particular Facts Presented by This Case.	23
A. The Language of the Agreement	24
B. The Intent of the Parties	26
C. The Implications of Federalism	28
V. If the Court Grants This Petition, It Should Also Entertain Volt's Alternative Argument That the Provisions of C.C.P. §1281.2(c) Should Not Be Construed to Authorize a Party's Avoidance of Its Duty to Arbitrate in the Circumstances Presented by This Case.	28
CONCLUSION	29

## ISSUES PRESENTED

The principal issue which is presented by this case, and which evoked divided opinions from the members of the panel that heard the case in the court of appeal, is whether a choice-of-law clause in a construction contract specifying that the contract "shall be governed by the law of the place where the project is located" effectively precludes reliance on the Federal Arbitration Act to enforce an agreement to arbitrate any dispute arising under the contract, and thus authorizes a trial court to deny such enforcement pursuant to a provision of state law that directly conflicts with the otherwise applicable mandate of the federal Act.

A secondary issue which the court may be required to address in the event it should grant this petition is whether §1281.2(c) of the Code of Civil Procedure, which empowers the superior courts to refuse enforcement of an arbitration agreement when one party to the agreement is also a party to related litigation with third persons, may properly be invoked to



deny such enforcement where the party resisting arbitration has himself initiated the litigation with such third persons in direct response to the demand for arbitration.

#### INTRODUCTORY SUMMARY

This case presents the single most important unresolved issue concerning the relationship between the dictates of the Federal Arbitration Act and the laws of the several states governing the enforcement of arbitration agreements. That issue is whether and under what circumstances an agreement to arbitrate that is otherwise clearly enforceable under the federal Act may nevertheless be denied enforcement pursuant to a conflicting state statute on the ground that a choice-of-law clause in the parties' contract precludes reliance on the federal Act. This question has never been addressed by either this court or the United States Supreme Court. Meanwhile, however, the issue has continued to arise with great frequency and has evoked sharply divergent opinions in the other state courts and lower federal courts. This divergence of

opinion has particularly manifested itself in the decisions of the courts of appeal of this state, which have reached entirely disparate conclusions regarding the proper disposition of this issue in the four cases arising in California in which the question has so far been presented. The divided opinions of the justices of the court of appeal in this very case furnish a telling illustration of the serious disagreement over this issue which currently exists among the judiciary. There is thus little doubt that the issue is in grave need of definitive resolution by this court. As such, it comprises a virtual paradigm of the sort of issue for which review by the court is "necessary to secure uniformity of decision or the settlement of important questions of law" within the meaning of the provisions of Rule 29(a) of the Rules of Court that define the conditions under which a petition for review should be granted. The remainder of this petition, following the Statement of the Case, will be devoted to a more detailed demonstration of this conclusion.

## STATEMENT OF THE CASE

\*\*\*

### REASONS FOR GRANTING REVIEW

- I. There Is No Serious Dispute That, Unless the Choice-of-Law Clause Were Found to Require a Different Result, Federal Law Would Govern the Disposition of This Case and Would Dictate That Volt's Petition to Compel Arbitration Should Be Granted.

As stated above, the major issue presented by this case is whether the application of the Federal Arbitration Act to this controversy is foreclosed by the choice-of-law clause in the parties' agreement. Most of this petition will consist of a discussion of the general importance of this issue and a description of the conflict over the issue that has arisen among the courts of appeal. Preliminarily, however, it is useful to place the issue in perspective within the context of this particular case by demonstrating that it is indeed dispositive of the outcome of this lawsuit. This demonstration will involve nothing more than the brief statement of certain basic and uncontroversial propositions regarding the general applicability of the

federal Act. Taken together, these propositions establish that, unless the choice-of-law clause were found to dictate a different result, the provisions of the federal Act would govern this proceeding and would require that Volt's petition to compel arbitration be granted.

First, it is by now well settled that the Federal Arbitration Act creates a comprehensive body of substantive law governing all arbitrations arising out of transactions affecting interstate commerce, and that its provisions are therefore required to be enforced in state courts, as well as federal courts, to the exclusion of any conflicting provisions of state law. Perry v. Thomas, \_\_\_ U.S. \_\_\_, 107 S.Ct. 2520, 2525 (1987); Southland Corp. v. Keating, 465 U.S. 1, 12 (1984); Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24, 26 (1983); Liddington v. The Energy Group, Inc., 192 Cal.App.3d 1520, 1526 (1987); Tonetti v. Shirley, 178 Cal.App.3d 632, 637-38 (1985). As the United States Supreme Court stated in the





often quoted passage from its opinion in Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, the Act "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act ... [which] governs that issue in either state or federal court ... notwithstanding any state substantive or procedural policies to the contrary." Id., 460 U.S. at 24.

Secondly, it is equally clear that if the federal Act were to be applied to this case, its application would necessarily require reversal of the order of the superior court denying Volt's petition to compel arbitration. As noted earlier, the sole basis for that order and for the court of appeal's decision affirming the order was the provision of C.C.P. §1281.2(c) that authorizes denial of a petition to compel arbitration where related non-arbitrable claims have been asserted against third parties in a pending lawsuit. The Federal Arbitration Act contains no counterpart provision permitting avoidance of an

arbitration agreement in these circumstances, and the decisions of the state and federal courts applying the Act have therefore unanimously held that the existence of such non-arbitrable third-party claims does not afford a proper ground for denying or staying the enforcement of such an agreement. Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, 460 U.S. at 19-20; C.Itoh & Co. v. Jordan Intl. Co., 552 F.2d 1228, 1231 (7th Cir. 1977); Acevedo Maldonado v. PPG Industries, Inc., 514 F.2d 614, 617 (1st Cir. 1975); Liddington v. The Energy Group, supra, 192 Cal.App.3d at 1528; Ford v. Shearson Lehman Amer. Express, Inc., supra, 180 Cal.App.3d at 1017; R.J. Palmer Constr. Co. v. Wichita Band Instr. Co., 642 P.2d 127, 131 (Kan.App. 1982); Episcopal Housing Corp. v. Federal Ins. Co., 239 S.E.2d 647, 652 (S.C. 1977). Cf. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218-21 (1985). If applied in this case, this settled federal rule would clearly preempt the conflicting prescriptions of C.C.P. §1281.2(c) and eliminate the only legal basis for the

order denying Volt's petition. Liddington v. The Energy Group, Inc., supra, 192 Cal.App.3d at 1528. As the court of appeal itself acknowledged, it is thus "apparent that were the federal rules to apply, Volt's petition to compel arbitration would have to be granted" (Majority Opinion, p. 3).

Finally, there is no question that, unless otherwise dictated by the choice-of-law clause, federal law would indeed govern the disposition of this case, because the arbitration agreement at issue here clearly "evidenc[es] a transaction involving ... commerce among the several states" within the meaning of the provisions of the federal Act defining the scope of its coverage. 9 U.S.C. §§1-2. Volt established by uncontradicted evidence in the trial court that a large proportion of its manpower and equipment was transferred or shipped to California for use on the Stanford project, and that the project was administered from Volt's offices outside California (JA 207-8). Under the standards enunciated in the case law on this issue, these facts clearly

establish a sufficient nexus with inter- state commerce to bring this transaction well within the purview of the federal Act. Prima Paint Co. v. Flood & Conklin, 388 U.S. 395, 401 (1967); Mesa Ltd. P'ship. v. Intrastate Gas Corp., 797 F.2d 238, 243 (5th Cir. 1986); In re Mercury Constr. Corp., 656 F.2d 933, 942 (4th Cir. 1981), affd. 460 U.S. 1 (1983); Pathman Const. Co. v. Knox Cty. Hosp. Assn., 326 N.E.2d 844, 848-51 (Ind.App. 1975); Episcopal Housing Corp. v. Federal Ins. Co., supra, 239 S.E.2d at 650-52; Allison v. Medicab Intl., Inc., 597 P.2d 380, 382 (Wash. 1979).

All of these settled propositions were accepted by both the court of appeal and the trial court, and in fact have never been seriously contested by Stanford itself.\* It follows that the only remaining issue standing

---

\* This description of Stanford's position must be qualified in one minor respect. In its brief in the court of appeal, Stanford attempted, somewhat obliquely, to cast some doubt on the general applicability of the remedial provisions of the federal Act in state courts by pointing to an admittedly rather puzzling footnote in the opinion of the United States Supreme Court in Southland (continued)

in the way of a determination that Volt's petition to compel arbitration pursuant to the federal Act must be granted, and that the

---

(footnote contd.) Corp. v. Keating, supra, where the court, in the course of responding to one of the points made by the dissenting justice, had suggested that certain sections of the Act specifying the methods for enforcing arbitration agreements might not be specifically applicable in state trial courts. (Stanford's Brief, pp. 12-13, citing Southland, supra, 465 U.S. at 16n.10). In its reply brief, Volt responded to this argument by demonstrating at considerable length that the actual holdings of the Supreme Court, including the holding in Southland itself, as well as the decisions of many state and lower federal courts on the issue, had clearly established that the remedies and procedures prescribed by the federal Act, whether by virtue of these particular sections or otherwise, were clearly enforceable in state courts as well as in federal courts (Volt's Reply Brief, pp. 15-34). This entire debate was ultimately mooted by another decision of the Supreme Court handed down after the filing of the briefs but before the oral argument in the court of appeal. In that decision, Perry v. Thomas, supra, the court squarely held, by specifically enforcing a petition to compel arbitration brought in a California superior court under the very sections of the Act referred to in the enigmatic Southland footnote, that these procedural provisions of the federal Act were indeed fully applicable in state courts. Id., 107 S.Ct. at 2523 and n.1. As the court of appeal apparently assumed in its opinion in this case, this intervening decision of the Supreme Court has effectively eliminated any serious possibility of further controversy over this point.



contrary order of the trial court must be reversed, is the question whether the application of federal law to this case is foreclosed by the clause in the parties' agreement specifying that its enforcement "shall be governed by the law of the place where the project is located." Having thus established that this issue is indeed dispositive of this case, Volt will now turn to a demonstration that the issue clearly warrants plenary review by this court, because of both its inherent importance and the conflict it has engendered among the courts of appeal of this state.

II. The Decision of the Court of Appeal on the Effect of the Choice-of-Law Clause Is in Clear Conflict with the Decisions of Other California Courts of Appeal, as Well as the Virtually Unanimous Decisions of the Courts in Other Jurisdictions.

A. The Decision of the First District in the Liddington Case

In holding that the choice-of-law clause in the Volt-Stanford contract precluded reliance on the federal Act and thus permitted the trial court to deny Volt's petition to compel arbitration pursuant to C.C.P. §1281.2(c), the

court of appeal in this case placed itself in direct conflict with the decision rendered only three months earlier by the Court of Appeal for the First Appellate District in Liddington v. The Energy Group, Inc., supra, 192 Cal.App.3d 1520. In the Liddington case, the contract between the parties contained both an arbitration clause and a choice-of-law clause specifying that the contract would be "construed under the laws of California." Id., 192 Cal.App.3d at 1524. \*\*\* The party resisting arbitration contended \*\*\* that application of the federal Act was \*\*\* precluded by the clause of the parties' agreement requiring that it be construed in accordance with California law. Id. \*\*\* The trial court accepted this latter contention and accordingly entered an order pursuant to C.C.P. §1281.2(c) rejecting the petition to compel arbitration and staying the arbitration pending the outcome of the lawsuit.

\*\*\*

The court of appeal reversed this ruling. In its opinion, the court held that, not-

withstanding the clause of the contract requiring its interpretation in accordance with California law, this choice-of-law provision could not alter the conclusion, otherwise mandated by the decisions of the United States Supreme Court, that "Code of Civil Procedure section 1281.2 is preempted to the extent it is used to stay arbitration of a dispute governed by the FAA." Id. at 1525. The court accordingly remanded the case with a direction that the stay of the arbitration should be dissolved, and that the arbitration should be allowed to proceed pursuant to the terms of the federal Act. Id. at 1528-29.

\*\*\*

B. The Decision of the Fourth District in the Garden Grove Case

The third California decision that has addressed the issue of the effect of a choice-of-law clause on the application of the Federal Arbitration Act is the decision of the Court of Appeal for the Fourth District in Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., 140 Cal.App.3d 251 (1983). That decision

attempts to steer something of a middle course between the Liddington decision and the decision of the court of appeal in this case, and consequently ends up following an approach to this issue that is at odds in various respects with both of these other decisions.

The Garden Grove case, like this one, involved a construction contract containing an arbitration clause, a claim by the contractor against the owner, and a claim for indemnity by the owner against the project architect and construction manager. Unlike the contract at issue in this case, however, the contract between the owner and the contractor expressly provided that the owner would be excused from his duty to arbitrate in the event of a dispute with another participant in the project who could not be compelled to join in the arbitration; and a corresponding clause in the owner-architect agreement provided that the architect could not be compelled to join in any arbitration involving the contractor or any other third party. The contract between the owner and the contractor also contained a

clause which provided, according to the court's description, that the contract would be governed by "the law of the construction site." Id. at 259.

\*\*\*

In the course of its opinion, the court considered the question whether federal or state law should govern the disposition of the case in the light of the choice-of-law clause in the owner-contractor agreement. The court interpreted the language of the clause as a reference to California law, and opined that "[i]n the face of such a choice of laws provision, California law applies unless preempted by the FAA." Id. at 262 (emphasis added). The court went on to conclude that the provisions of C.C.P. §1281.3 requiring the consolidation of related arbitrations were not in fact preempted by the federal Act because, in its view, there was "no conflict between ... this policy [of consolidating arbitrations] ... and the federal scheme of regulation embodied in the FAA." Id.

On the one hand, this decision is



consistent with the decision of the court of appeal in this case - and correspondingly inconsistent with the Liddington decision - to the extent that it construes the choice-of-law clause in the parties' agreement as an exclusive reference to California law and holds that such a contractual provision may effectively preclude the application of the Federal Arbitration Act in appropriate circumstances. On the other hand, the decision is wholly inconsistent with the decision in this case to the extent that it declares that state law may only be applied pursuant to a choice-of-law clause "unless preempted by the FAA," and that federal law would have to be applied even in the face of such a contractual stipulation in the event of a direct conflict between the dictates of the federal Act and the prescriptions of state law.

\*\*\*

C. The Decision of the Second District in the Ford Case

The issue of the effect of a choice-of-law clause on federal preemption was also presented

by the facts, though not explicitly argued by the parties or addressed by the court, in the 1986 decision of the Court of Appeal for the Second District in Ford v. Shearson, Lehman Amer. Express, Inc., supra, 180 Cal.App.3d 1011. The parties' contract in that case provided for arbitration "pursuant to the arbitration laws of the State of New York." Id., 180 Cal.App.3d at 1016. The parties apparently chose to ignore this provision in urging that the issue before the court - the arbitrability of a claim of fraud in the inducement - be resolved in exclusive accordance with federal law. The court expressly approved this approach, observing in this regard that "[t]he parties are correct in urging that federal law, namely the Federal Arbitration Act (9 U.S.C.A. §2), is applicable since the agreements in question involve securities transactions in interstate commerce." Id. at 1017. The court went on to adjudicate the fraud issue pursuant to federal law, although it also referred in passing to certain decisions of the California and New

York courts that it viewed as consistent with the federal rule. Id. at 1018-24.

\*\*\*

D. The Numerous and Virtually Unanimous Contrary Decisions of the Courts of Other Jurisdictions

Besides departing from the holdings of the other courts of appeal in this state, the decision of the court of appeal on the issue presented here conflicts with the virtually unanimous decisions addressing the same issue in other jurisdictions. With a single exception, these decisions have uniformly held that a choice-of-law clause in an arbitration agreement of the kind involved in this case is ineffective to displace the otherwise applicable provisions of the Federal Arbitration Act.

The courts reaching this result have relied on a variety of different rationales to justify their decisions. Thus, in some of these cases involving choice-of-law clauses identical to the one at issue here, the courts have simply interpreted the language of the clause as encompassing federal as well as state law,

observing in this regard that the phrase "'the law of the place where the project is located' ... would certainly include all applicable law, including the Federal Arbitration Act."

Episcopal Housing Corp. v. Federal Ins. Co., supra, 239 S.E.2d at 650n.1. Accord Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., 625 F.2d 22, 25n.8 (5th Cir. 1980); See Paul Allison, Inc. v. Minikin Storage, Inc., 486 F.Supp. 1, 2-4 and n.1 (D.Neb. 1979). A second group of decisions have adopted the alternative rationale espoused by the opinion of the dissenting justice in this case - namely, that any choice-of-law provision designating the laws of a state of the United States must be deemed to encompass federal as well as state law because it is a familiar tenet of our federal system that the laws of every state incorporate and include the laws of the United States. Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1270 (7th Cir. 1976); Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634 (Tex.Civ.App. 1973). Thirdly, a number of courts have gone so far as to hold that any

choice-of-law clause that purports to preclude the application of the federal Act is simply invalid to the extent that it would have the effect of rendering the arbitration agreement unenforceable in the case before the court and of thus frustrating the federal policy favoring arbitration. Mesa Ltd. P'ship. v. Louisiana Intrastate Gas Corp., supra, 797 F.2d at 243-44; Commonwealth Edison Co. v. Gulf Oil Corp., supra, 541 F.2d at 1269; Paul Allison, Inc. v. Minikin Storage, Inc., supra, 486 F.Supp. at 3-4; Cone Mills Corp. v. August F. Nielsen Co., 455 N.Y.S.2d 625, 627 (N.Y.App. 1982).

Finally, several decisions, like the decision of the California Court of Appeal in Ford v. Shearson, Lehman Amer. Express Co., supra, have simply proceeded to apply the Federal Arbitration Act in the face of a contractual provision selecting state law as the governing law without explicitly stating any particular rationale for refusing to accord preclusive effect to such a choice-of-law provision.

E.g., LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Co., 791 F.2d 1331,



1338-39 (9th Cir. 1986); Collins Radio Co. v. Ex-Cell-O Corp., 467 F.2d 995, 997-98 (8th Cir. 1972); Hilti, Inc. v. Oldach, supra, 392 F.2d at 370, 371n.6; Pinkis v. Network Cinema Corp., 512 P.2d 751, 753, 756-57 (Wash.App. 1973).

There are thus a total of at least twelve decisions in other jurisdictions that have held, on one ground or another, that a choice-of-law provision of the kind involved here is ineffective to preclude reliance on the Federal Arbitration Act as the source of the law governing the enforcement of an arbitration agreement. Arrayed against this substantial body of authority is a single decision, the ruling of the Louisiana Supreme Court in Standard Co. of New Orleans v. Elliott Constr. Co., 363 So.2d 671 (La. 1978), which is the only decision outside California ever to hold that such a choice-of-law provision may indeed exclude the application of the federal Act. I must therefore be concluded that the decision of the court of appeal in the instant case, besides contravening other decisions of the courts of appeal in this state, also runs

counter to the overwhelming majority of the decisions on the same issue in other jurisdictions.

III. The Issue Presented Here Is of Substantial Importance, Both Because It Is Likely to Arise with Great Frequency and Because Its Proper Resolution Will Determine the Ultimate Enforceability of Arbitration Agreements in Precisely Those Categories of Transactions in Which Arbitration Is Most Commonly Used as a Means of Settling Disputes.

---

\*\*\*

IV. The Opinion of the Court of Appeal Reflects a Wholly Unsatisfactory Resolution of the Question Presented Here, in Both Its General Aspect and in the Context of the Particular Facts Presented by This Case.

---

Notwithstanding the importance of the issue presented here and the existing conflict among the views of the courts of appeal on this issue, Volt recognizes that this court might nevertheless be disinclined to address the issue if it should appear that the opinion of the court of appeal reflected such a persuasive resolution of the problem that its decision might well be accepted as authoritative in all future cases raising the same issue. Alternatively, this court might harbor the same

disinclination to reexamine the matter if it should appear that this case involved special facts that would support the court of appeal's decision without regard to the correctness of its resolution of the general question of the effect of choice-of-law clauses on the application of the Federal Arbitration Act. In this final section of this petition, Volt will demonstrate, by undertaking a particular analysis of the reasoning of the court of appeal, that neither of these circumstances is present here, and that in fact the court of appeal's opinion reflects a wholly unsatisfactory resolution of this question in both its general aspect and in the context of the facts of this particular case.

\*\*\*

A. The Language of the Agreement

\*\*\*

B. The Intent of the Parties

\*\*\*

C. The Implications of Federalism

Finally, the majority opinion of the court of appeal entirely fails to take account of the

serious obstacle raised by the opinion of the dissenting justice to the conclusion reached by the court regarding the preclusive effect of the choice-of-law clause. As Justice Cappacioli demonstrates in his dissent, even if one accepts the majority's view that this contractual provision requires the resolution of this controversy in accordance with California state law, this conclusion does not preclude the application of the Federal Arbitration Act, because, in the words of this court, "[t]he legislation of Congress is a portion of the law of each State" by virtue of the mandate of the Supremacy Clause of the federal Constitution, and is therefore just as much the law of California as any of the statutes enacted by its legislature. Miller v. Municipal Court 22 Cal.2d 818, 848, 850 (1943). Volt cannot improve upon Justice Cappacioli's lucid presentation of this point, and will accordingly content itself with simply observing that this consideration provides a final persuasive reason why the majority opinion of the court of appeal cannot be

accepted as an adequate resolution of the important issue that is presented by this case.

V. If the Court Grants This Petition, It should Also Entertain Volt's Alternative Argument That the Provisions of C.C.P. §1281.2(c) Should Not Be Construed to Authorize a Party's Avoidance of Its Duty to Arbitrate in the Circumstances Presented by This Case.

---

\*\*\*

#### CONCLUSION

Volt has demonstrated in this petition that the decisions of the appellate courts on the principal issue presented by this case are in serious conflict, that this issue is of determinative significance with respect to the enforceability of a great many arbitration agreements, and that the issue has not been satisfactorily resolved by the opinion of the court of appeal. This court's examination of the issue is therefore clearly "necessary to secure uniformity of decision or the settlement of important questions of law" within the meaning of Rule 29(a) of the Rules of Court.

//

//

//



For this reason, Volt respectfully submits that  
this petition should be granted.

Dated: November 12, 1987

Respectfully submitted,

PETTIT & MARTIN  
JAMES E. HARRINGTON  
ROBERT B. THUM  
DEANNE M. TULLY

Attorneys for Petitioner  
and Appellant Volt  
Information Sciences, Inc.

APPENDIX H -

RELEVANT STATUTES AND  
CONSTITUTIONAL PROVISIONS

---

SUPREMACY CLAUSE OF  
THE UNITED STATES CONSTITUTION  
(U.S. Const., Art. VI, cl. 2)

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

FEDERAL ARBITRATION ACT, §§1-4  
(9 U.S.C. §§1-4)

Section 1. "Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished to vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any territory of the United States or in the District of Columbia, or between any such

Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.

Section 2. A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration

under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with the arbitration.

Section 4. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of a controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service



thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such

demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

CALIFORNIA ARBITRATION ACT, §1281.2(c)  
(Cal.Code Civ.Proc. §1281.2(c))

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it

determines that:

...

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

...

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision

(c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

(3)  
No. 87-1318

Supreme Court, U.S.  
FILED

MAR 7 1988

JOSEPH E. HANCOCK JR.

---

**In The  
Supreme Court of the United States**

**October Term, 1987**

---

**VOLT INFORMATION SCIENCES, INC.,**

*Appellant,*

**vs.**

**THE BOARD OF TRUSTEES OF THE LELAND  
STANFORD JUNIOR UNIVERSITY, a body  
having corporate powers,**

*Appellee.*

---

**ON APPEAL FROM THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA,  
SIXTH APPELLATE DISTRICT**

---

**MOTION TO DISMISS OR AFFIRM APPEAL**

---

**McCutchen, Doyle, Brown  
& Enersen**

**DAVID M. HEILBRON  
(Counsel of Record)**

**LYNN H. PASAHOW**

**STEPHEN L. GODCHAUX**

**Three Embarcadero Center**

**San Francisco, CA 94111**

**Telephone: (415) 393-2000**

*Counsel for Appellee*

*The Board of Trustees of the  
Leland Stanford Junior  
University*



**QUESTIONS PRESENTED**

A state court interpreted a choice of law clause in a private agreement, and enforced the parties' agreement to arbitrate in accordance with the terms to which the court found they had agreed.

1. Does a state court interpretation of a choice of law clause in a private agreement present a substantial federal question?

2. Does a state court's enforcement of an agreement to arbitrate in accordance with its terms present a substantial federal question?

**LIST OF RELATED COMPANIES REQUIRED BY  
UNITED STATES SUPREME COURT RULE 28.1**

Pursuant to Supreme Court Rule 28.1, Appellee The Board of Trustees of the Leland Stanford Junior University lists the following non-wholly owned subsidiary and affiliate:

Stanford University Hospital

**TABLE OF CONTENTS**

	Page
QUESTIONS PRESENTED .....	i
MOTION TO DISMISS OR AFFIRM .....	1
CONSTITUTIONAL PROVISIONS PURPORTEDLY INVOLVED .....	1
STATEMENT OF THE CASE .....	1
ARGUMENT .....	6
REVIEW BY THIS COURT WOULD BE UNWARRANTED .....	6
A. Introductory Summary .....	6
B. Volt's "Principal" Argument Is Wrong .....	7
1. The Court's Decision Was Compelled By The Most Basic Principles Of Arbitra- tion Law .....	8
2. Volt's Construction Of The Choice Of Law Provision Is Wrong, And Presents No Question Appropriate For Review In This Court .....	12
C. The Court of Appeal's Decision Has No Precedential Effect .....	15
CONCLUSION .....	17

## TABLE OF AUTHORITIES

CASES	Page
<i>Cal. Retail Liquor Dealers Assn. v. Midcal Alum.</i> , 445 U.S. 97 (1980) .....	14
<i>Chan v. Drexel Burnham Lambert, Inc.</i> , 178 Cal. App. 3d 632 (1986) .....	10, 11
<i>Day &amp; Zimmermann, Inc. v. Challoner</i> , 423 U.S. 3 (1975) .....	14
<i>Dean Witter Reynolds, Inc. v. Byrd</i> , 470 U.S. 213 (1985) .....	9
<i>Delta Lines, Inc. v. International Brotherhood of Teamsters</i> , 66 Cal. App. 3d 960 (1977) .....	11
<i>Edelman v. Jordan</i> , 415 U.S. 651 (1974) .....	16
<i>Eric A. Carlstrom Constr. Co. v. Independent School Dist. No. 77</i> , 256 N.W.2d 479 (Minn. 1977) .....	13
<i>Fidelity Fed. S. &amp; L. Assn. v. de la Cuesta</i> , 458 U.S. 141 (1982) .....	14
<i>Garden Grove Community Church v. Pittsburgh- Des Moines Steel Co.</i> , 140 Cal. App. 3d 251 (1983) .....	13
<i>Lane-Tahoe, Inc. v. Kindred Constr. Co.</i> , 536 P.2d 491 (Nev. 1975) .....	13
<i>Main v. Merrill Lynch, Pierce, Fenner &amp; Smith, Inc.</i> , 67 Cal. App. 3d 19 (1977) .....	10
<i>Mandel v. Bradley</i> , 432 U.S. 173 (1977) .....	16
<i>Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983) .....	10
<i>O'Malley v. Wilshire Oil Co.</i> , 59 Cal. 2d 482 (1963) .....	10
<i>Pas-Ebs v. Group Health, Inc.</i> , 442 F. Supp. 937 (S.D.N.Y. 1977) .....	11

## TABLE OF AUTHORITIES—Continued

	Page
<i>Perry v. Thomas</i> , — U.S. —, 107 S. Ct. 2520 (1987) .....	8, 10
<i>Prima Paint Corp. v. Flood &amp; Conklin</i> , 388 U.S. 395 (1967) .....	9
<i>Smith v. Allwright</i> , 321 U.S. 649 (1944) .....	16
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 (1984) .....	8, 10
<i>Standard Co. v. Elliott Constr. Co.</i> , 363 So. 2d 671 (La. 1978) .....	13
<i>Vespe Contracting Co. v. Anvan Corporation</i> , 399 F. Supp. 516 (E.D.Pa. 1975) .....	11

## CONSTITUTION

United States Constitution, Article VI, cl. 2 .....	1
---	---

## STATUTES AND CODES

Federal Arbitration Act 9 U.S.C. §§ 1-4 .....	1, 8
California Code of Civil Procedure § 1281.2(c) .....	<i>passim</i>

## RULES

Rules of the Supreme Court Rule 16 .....	1
Rule 17 .....	16
California Rules of Court Rule 977(a) .....	5, 16

## **MOTION TO DISMISS OR AFFIRM**

Pursuant to Rule 16 of the Rules of the Supreme Court, appellee The Board of Trustees of the Leland Stanford Junior University moves to dismiss this appeal or to affirm the judgment of the California Court of Appeal, Sixth Appellate District, in this case. The motion is based on the grounds that:

1. The appeal fails to raise a substantial federal question and the judgment rests on adequate non-federal bases (Rule 16.1(b)); and
2. The purported federal question is so insubstantial that no further argument is warranted. (Rule 16.1(b), (d))

---

## **CONSTITUTIONAL PROVISIONS PURPORTEDLY INVOLVED**

The constitutional and statutory provisions involved in this case are the Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl. 2), sections 1-4 of the Federal Arbitration Act (9 U.S.C. §§ 1-4), and section 1281.2(c) of the California Code of Civil Procedure. These provisions are set forth in Appendix H of the Appendices To Jurisdictional Statement of Appellant ("App. —").

---

## **STATEMENT OF THE CASE**

The underlying dispute arises out of a construction project at the Stanford University campus adjoining Palo



Alto, California. Pursuant to a written contract with appellee The Board of Trustees of the Leland Stanford Junior University ("Stanford"), appellant Volt Information Sciences, Inc. ("Volt") was the construction contractor for the project. (JA 3, 17-117)<sup>1</sup> During the course of the construction Stanford terminated the Volt contract because of Volt's material breaches of it. (JA 3, 118-119) Volt then requested reinstatement, and after various negotiations, Stanford and Volt signed a reinstatement agreement. (JA 3, 4, 120-21) In the reinstatement agreement Volt agreed it would not seek any additional compensation for work it performed in order to remedy its earlier breaches of the construction contract. (JA 3, 120-21)

On August 27, 1986, Volt presented Stanford with a demand for arbitration of a claim that seeks additional compensation for the work Volt performed to remedy its own breaches of the construction contract and for which it agreed it would not seek additional compensation. (JA 4, 185-206) Thus Volt violated the reinstatement agreement and ignored its promise to be responsible for the necessary corrective work. Now Volt claims that the corrective work was necessary because construction drawings and project management provided to Stanford by defendants Brian-Kangas-Foult & Associates ("BKF&A") and Telecommunications International, Inc. ("TII") were inadequate or improper, and for other reasons. (JA 183, 187-88) Volt seeks to hold Stanford, as the owner of the

<sup>1</sup> The Parties' Joint Appendix filed in the California Court of Appeal is cited here as "JA —."

property on which the project was constructed, liable for the claimed errors of TII and BKF&A.

The contract between Stanford and Volt provides that it shall be governed by the law of "the place where the Project is located," California. (JA 49) Subject to the provisions of the governing law and the rules of the American Arbitration Association, the parties also agreed to arbitrate disputes "relating to this contract or the breach thereof." (JA 61) The contracts between Stanford and TII and Stanford and BKF&A contain no arbitration provision. (JA 126-134, 135-143, 144-150)

Volt goes into some detail as to the presumed intent of the parties to this construction project (Jurisdictional Statement ["Jur. St."], pp.54-57). Volt complains that Stanford could have avoided the problem of duplicative litigation by "inserting a proviso excusing it from its duty to arbitrate. . . ." (Jur. St., p.55). Volt has an odd view as to how agreements are made. One party does not just "insert" provisions in them; both parties to them negotiate terms, and agree to some but not others. Stanford, TII and BKF&A did not agree to arbitrate. That is the fact that matters here.

On August 27, 1986, Stanford and Volt concluded settlement discussions seeking to resolve their dispute. That is the same day on which Volt filed its arbitration demand. (JA 183, 185-206) One week later, on September 4, 1986, Stanford filed its complaint in the Superior Court, naming as defendants Volt, BKF&A and TII. (JA 1-150) The complaint states claims against Volt based upon, among other things, fraud, estoppel, breach of contract, and bad faith denial of the existence of a contract. It also asks



for a judgment declaring that, if Stanford is held liable to Volt on account of TH or BKF&A's errors, then TH and BKF&A are required to indemnify Stanford for any amounts it must pay Volt.

Stanford could not arbitrate its indemnity claims against TH and BKF&A, because it had no arbitration agreement with either of them. If Stanford were forced to arbitrate Volt's claims alone before an arbitrator, the arbitration could result in a determination that TH's and BKF&A's drawings or TH's project management were inadequate, and an award for Volt. If Stanford then were forced separately to litigate its indemnity claims against TH and BKF&A in court, TH and BKF&A might not be bound by the arbitrator's award. A court or jury could find that their drawings and management were adequate, and deny indemnity.

Stanford filed its lawsuit in Superior Court to avoid the danger of those conflicting results and to resolve all these disputes at the same time and place. A court in California was the only forum in which Volt's claims against Stanford and Stanford's claims against Volt, TH and BKF&A all could be resolved at the same time and place. Volt moved to stay the Superior Court proceeding while the arbitration went forward, and Stanford sought an order under CCP § 1281.2(c) staying the arbitration while the litigation went forward.

Volt argued that the clause in the parties' agreement providing that the agreement shall be governed by the "law of the place where the Project is located" did not mean California law, where the Project is located. Rather, Volt said, the agreement was in interstate commerce; the

Federal Arbitration Act accordingly applied to it, absent the choice of law clause; and the choice of law clause changed nothing, since it meant (somehow) that the Federal Arbitration Act, not the California Act, governed. The Federal Act contains no counterpart provision to CCP § 1281.2(c). Accordingly, Volt's argument concluded, § 1281.2(c) did not apply here.

Volt also claimed that if California law and thus CCP § 1281.2(c) did apply, the Superior Court ought not exercise its discretion to issue a stay under it.

The Superior Court held that § 1281.2(c) did apply, exercised its discretion, and stayed the arbitration under it. Volt appealed to the Sixth Appellate District. (JA 255) The Court of Appeal enforced the parties' choice of law provision; held that the parties had agreed by it to arbitrate only in accordance with California law and thus CCP § 1281.2(c) applied under it; held that the Superior Court's stay order was within its discretion under CCP § 1281.2(c); and affirmed that order.

Volt filed a petition for review in the California Supreme Court (App. G). On December 17, 1987, the Supreme Court issued its order denying Volt's petition for review (App. B). By the same order, the court directed that the court of appeal's opinion should not be published in the permanent edition of the official California Appellate Reports (*id.*), and, accordingly, under California law the decision is not precedent in any respect as to any matter. California Rule of Court 977(a). Volt filed its notice of appeal to this Court on January 14, 1988 (App. D).

## ARGUMENT

### I. REVIEW BY THIS COURT WOULD BE UNWARRANTED

#### A. Introductory Summary.

This case presents no substantial federal question for review by this Court. The California Court of Appeal simply followed the settled federal and state rule that arbitration is a matter of agreement, and that parties cannot be forced to arbitrate a dispute they have not agreed to arbitrate. Accordingly, the Court enforced the parties' agreement, including its choice of law clause, according to its terms.

Appellant Volt suggests that there is a Supremacy Clause issue here, but there really is not, and Volt ultimately identifies none. Thus Volt does not dispute that settled and supreme federal/state rule of law, or argue that the Court of Appeal did not follow it. Instead, Volt contends that the Court's reading of the choice of law clause was "unsound;" the "principal issue" presented by this case, Volt argued to the California Supreme Court, was whether the court misread that clause. (App. G, p.1) But the Court's reading was clearly right and Volt's clearly wrong. Moreover, right or wrong, a state court's reading under state law of a choice of law clause in a private agreement does not present a question for review by this Court.

Volt asserted a "secondary issue" to the California Supreme Court with respect to the interpretation of Section 1281.2(c) of the California Code of Civil Procedure. (App. G, p.1) That provision grants the superior courts

discretion to stay arbitration when one party to an arbitration agreement is also a party to related litigation with third persons who have not agreed to arbitrate, and who therefore cannot be brought into the arbitration. Volt contended that § 1281.2(c) does not apply when the party "resisting arbitration has himself initiated the litigation with such third persons" after the demand for arbitration is filed. (App. G, p.2)

There was nothing to that contention; the California statute itself answered it. The statute provides that it applies whether the party "resisting arbitration" initiates the litigation after the demand is filed or before. The Superior Court applied the statute in accordance with its terms, and stayed the arbitration. That stay order was well within the Court's discretion. It certainly presents no substantial federal question for review by this Court, and Volt does not raise the issue here.

Moreover, these non-existent questions are presented by a decision which in essence does not exist. The California Supreme Court directed that the Court of Appeal's opinion should not be published in the permanent edition of the official California Appellate Reports. The decision therefore has no precedential value in any matter. Non-existent issues presented by a non-existent decision ought not occupy this Court's time.

#### B. Volt's "Principal" Argument Is Wrong.

The Court of Appeal interpreted the parties' agreement under state law, and determined under it that the parties agreed that the "laws of California, of which section 1281.2 is certainly a part, are to govern their con-

tract.” (App. A, p.4) The Court then enforced that agreement in accordance with its terms. That was exactly what the law, state and federal, required the Court to do.

**1. The Court's Decision Was Compelled By The Most Basic Principles Of Arbitration Law.**

A court order enforcing the parties' agreement in accordance with its terms in no way conflicts with the Federal Arbitration Act (“FAA”), the Supremacy Clause or any other provision of federal law.<sup>2</sup> To the contrary, courts are compelled to honor the parties' agreement by the most basic principles of arbitration law, federal and state.

<sup>2</sup> Volt claims that but for the parties' agreement, “there is no question that” federal law would govern the disposition of this case. (Jur. St., pp.23-24) The Court of Appeal assumed that to be true (App. A, pp.3-4), but there is substantial question in respect to it. *Southland Corp. v. Keating*, *infra*, 465 U.S. 1, 16 n.10 (1984), expressly did not “hold that §§ 3 and 4 of the [federal] Arbitration Act [the procedural provisions of the Act] apply to proceedings in state courts.” No Supreme Court case so holds. Moreover, §§ 3 and 4 by their terms do not refer to state courts; they refer to “Courts of the United States” and “United States District Court.” And indeed, it would be extraordinary for Congress to intend federal procedural rules to apply in state court; in particular it would be extraordinary for Congress to require a state to entertain piecemeal litigation when its legislature has said, through California Code Civ. Proc. § 1281.2(c) here, that it disapproves of it.

Volt claims that *Perry v. Thomas*, *infra*, — U.S. —, 107 S. Ct. 2520 (1987), resolves this issue (Jur. St., p.26 n.), but it does not mention it, much less purport to resolve it. In fact, *Perry's* holding was based on § 2, the substantive provision of the Act, not §§ 3 and 4. *Id.* at 2525-26.

We agree that this Court need not reach the issue, because the appeal lacks merit without regard to it.

Arbitration is a matter of agreement. A court cannot force parties to arbitrate a dispute they have not agreed to arbitrate. They can agree to arbitrate in any way they want; thus they can agree to arbitrate some disputes and not all, or in some circumstances and not all, or not at all.

Nothing in the FAA changes any of that or takes those rights away. Again, the contrary is so. The FAA is meant to enforce the parties' agreement, whatever it is, no less and no more than it is. Thus the FAA prohibits a state from refusing to enforce an arbitration agreement subject to the FAA in accordance with the agreement's terms. The FAA does not mandate a state to disregard the parties' agreement, much less compel them to arbitrate a dispute they have not agreed to arbitrate or in a way they have not agreed to arbitrate. Volt's own authorities make that clear. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (emphasis added):

“The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements.”

Accord, *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 402, 406 (1967) (claims for fraudulent inducement are for the arbitrator, not the Court, “except where the parties otherwise intend”; no one even claimed that parties are “not entirely free” to otherwise intend and “so con-



tract"); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983) (federal court should compel arbitration even if that causes piecemeal litigation "where necessary to give effect to the arbitration agreement"); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984) (state cannot refuse to arbitrate Franchise Act claims where parties "agreed" to arbitrate them); *Perry v. Thomas*, — U.S. —, 107 S.Ct. 2520, 2526 (1987) (state cannot refuse to arbitrate broker's wage claim where parties agreed to arbitrate it; the purpose of the federal Act "was to enforce private agreements into which parties had entered").

California law is exactly the same. See, e.g., *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 32 (1977):

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

Accord, *O'Malley v. Wilshire Oil Co.*, 59 Cal. 2d 482, 496 (1963); *Chan v. Drexel Burnham Lambert, Inc.*, 178 Cal. App. 3d 632, 640, 645 (1986); App. A, p.10.

The Court of Appeal simply followed those basic principles of arbitration law, and enforced the parties' agreement in accordance with its terms. It held "that the parties are at liberty to choose the terms under which they will arbitrate, and such a choice will not run afoul of the FAA." App. A, pp.10-11. It concluded that the Court would violate those basic principles of arbitration law were it not to enforce the parties' agreement, including its choice of law clause, in accordance with its terms. App. A, pp.11-12.

"Were the federal rules to be imposed in this case to override the parties' choice of law, the effect would be to force the parties to arbitrate where they agreed not to arbitrate. This result is not only inimical to the policies underlying state and federal arbitration law, . . . it also violates basic principles of contract law."

Accord, *Chan v. Drexel Burnham Lambert, Inc.*, above, 178 Cal. App. 3d at 640, 645:

"Arbitration is recognized as a matter of contract, and a party cannot be forced to arbitrate something in the absence of an agreement to do so." (*Vespe Contracting Co. v. Anvan Corporation* (E.D. Pa. 1975) (399 F. Supp. 516, 520.) The [federal] Act "does not dictate that we should disregard parties' contractual agreements . . . outlining the boundaries of the areas intended to be arbitrable." (*Pas-Ebs v. Group Health, Inc.* (S.D.N.Y. 1977) 442 F. Supp. 937, 940), and there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate. (*Delta Lines, Inc. v. International Brotherhood of Teamsters* (1977) 66 Cal. App. 3d 960, 966 [136 Cal. Rptr. 345]).

Volt does not dispute those basic principles, or contend that they do not apply here. Indeed, Volt says that notwithstanding the FAA, Stanford could have dealt with "the possibility of potentially duplicative proceedings resulting from disputes with other participants in the project" with whom it had no agreements to arbitrate; all Stanford need have done, Volt states, is to insert "a proviso excusing it from its duty to arbitrate" to deal with the "problem of duplicative litigation." (Jur. St., p.55) The Court of Appeal held that that is exactly what Stanford and Volt in effect agreed to do.

"If the parties here had expressly stated in their agreement that they wished to arbitrate only those disputes between themselves which did not involve third parties not bound by the arbitration agreement, this provision would presumably be enforceable. *In our view they accomplished the same thing by choosing to be governed by California law, thus incorporating the California rules of civil procedure governing arbitration agreements.*" (App. A, p.11.) (Emphasis added)

**2. Volt's Construction Of The Choice Of Law Provision Is Wrong, And Presents No Question Appropriate For Review In This Court.**

Thus Volt does not attack the settled and controlling principles on which the Court of Appeal's decision is based. Instead, it complains that the Court of Appeal concluded under state law that the parties consciously chose to be governed by "California law" and not otherwise applicable federal law, and that "the Court's interpretation of this contractual language is plainly unsound. . . ." "[A]n examination of the probable intent of the parties with respect to the laws that would govern their agreement," Volt goes on, "supports the conclusion that federal law should govern this controversy." (Jur. St., pp.54-57)

Volt is way off base. The agreement provided that it "shall be governed by the law of the place where the Project is located." The place the project was located was California. There is no place called federal. Therefore the contract clearly means that California law, the place of the project, governs. The Court of Appeal had "no doubt" about that (App. A, p.5), and, besides the fact that the clause clearly means that, the parties, who contracted in California, must be taken to have known it;

the year before their "agreement was forged," the California Court of Appeal so held. *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co.*, 140 Cal. App. 3d 251 (1983) (App. A, pp.5-6).<sup>3</sup>

But, Volt goes on, the choice of law clause really means that California-law-plus-federal-law-that-would-be-applicable-but-for-the-clause governs. (Jur. St., pp.51-59) The clause, however, does not say that, and the clause exists; there is no reason to interpret the clause but for the clause. Still, Volt continues, citing to the dissenting opinion, federal law and in particular the FAA are part of California law by "the fundamental constitutional principle that federal law is the 'supreme law of the land'." (Jur. St., p.57) But that argument is circular and assumes the premise it is meant to prove. The Supremacy Clause does not mandate that the FAA apply where, as

<sup>3</sup> Volt asserts that the parties would not have been aware of Calif. Code Civ. Proc. § 1281.2(c) because those who "prepared" the contract were not lawyers, citing to JA 22. (Jur. St., pp.54-55) JA 22 is simply the signature page of the contract. There is no evidence to support Volt's assertion, and it is in fact false.

The Court of Appeal pointed out that "courts in other states faced with identical language have reached the same result we do here." (App. A, pp.5-6) Volt agrees that one of those cases so held, *Standard Co. v. Elliott Constr. Co.*, 363 So. 2d 671 (La. 1978), but objects that the others, *Eric A. Carlstrom Constr. Co. v. Independent School Dist. No. 77*, 256 N.W. 2d 479 (Minn. 1977) and *Lane-Tahoe, Inc. v. Kindred Constr. Co.*, 536 P. 2d 491 (Nev. 1975) have no "bearing"; "the possible application of federal law" was not at issue there, Volt says. (Jur. St., p.34 n.) Volt misses the point. *Carlstrom* and *Lane-Tahoe* both hold that a clause identical to the one at issue here means that arbitration is to proceed in accordance with the laws of the state in which the project is located. 256 N.W. 2d at 479; 536 P. 2d at 493. That is the point.



here, the parties agree otherwise. The Supreme federal law mandates that agreements to arbitrate be enforced according to their terms. The parties agreed that California law applies. The Court of Appeal enforced that agreement as the supreme federal law—and state law—compelled it to. (Subpart 1, above)

Thus Volt's interpretation of the contract is plainly wrong. Even if it were not, whether the Court of Appeal properly interpreted the "probable intent of the parties" obviously presents a fact question. A fact question is not a substantial federal question for review by this Court. See *Cal. Retail Liquor Dealers Assn. v. Midcal Alum.*, 445 U.S. 97, 111-12 (1980). That is particularly so here because the fact question relates to a simple matter of contractual interpretation of a choice of law clause in a private commercial contract, a matter governed exclusively by state law. See *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (conflict-of-laws rules to be applied in federal court must conform to those prevailing in state courts.)<sup>4</sup> Indeed, Volt agrees that this case "depend[s]

<sup>4</sup> Volt places great reliance on the fact that this Court held that a choice of law clause containing the phrase "law of the jurisdiction" includes federal law. *Fidelity Fed. S. & L. Assn. v. de la Cuesta*, 458 U.S. 141, 157 n. 12 (1982).

First of all, Volt ignores the fact that the choice of law clause in the present case is different from the one in *de la Cuesta*. This clause specifies the laws of a physical place, the "place where the project is located." The *de la Cuesta* clause spoke to the law of a "jurisdiction" in the abstract. That semantic difference, however, is the beginning, not the end. The end is that Volt is asking this Court to review a simple matter of contractual interpretation in an area (choice of law) governed exclusively by state law. See *Day & Zimmermann, Inc. v. Challoner*, above, and *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97, 111 (1980).

upon the interpretation given by the court to the choice-of-law clause." (Jur. St., p.45) Volt raises no issue worthy of this Court's review.

Volt argues last, that unless its contention is made law any party can "evade his contractual duty to arbitrate by commencing litigation involving non-arbitrable ancillary claims against third persons." (Jur. St., p.43) That is nonsense. Stanford did not evade its "contractual duty"; Volt and Stanford agreed that California law, and thus, Cal. Code Civ. Proc. § 1281.2(e), applied. Stanford asked the Court to enforce that agreement in accordance with its terms, and the Court did. Volt tried to evade that agreement. The Court did not permit it to.

The Superior Court enforced the parties' agreement and exercised its discretion under CCP § 1281.2(e), soundly.<sup>5</sup> There was no abuse of discretion, and the Court of Appeal so held. (App. A, p.18) Volt says nothing to suggest that there was. This state court's discretionary application of a state statute to a private agreement in accordance with the agreement's terms presents no question to this Court to review.

### C. The Court of Appeal's Decision Has No Precedential Effect.

The California Supreme Court directed that the Court of Appeal's opinion should not be published in the per-

<sup>5</sup> Volt says § 1281.2(c) "afford[ed] [Stanford] a legal excuse from compliance with the duty to arbitrate," and that it is a "procedural device." (Jur. St., p.44) Volt is just name-calling. Section 1281.2(c) is meant to avoid piecemeal litigation arising out of the same transaction, and to avoid conflicting rulings on common issues of law and fact. The California legislature determined that those were worthy aims. Obviously they are.

manent edition of the official California Appellate Reports. Accordingly, that decision has no precedential value:

[Unpublished opinions] An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding. . . . California Rule of Court 977(a).

In short, Volt asks this Court to review a decision which creates no conflict in the case law, decides no important federal question, presents no other "special and important" consideration (Rule 17.1) and in essence does not exist. Indeed, the decision does not even determine these parties' rights on the merits; there has been no trial, and the parties' rights remain to be adjudicated. To borrow from Justice Roberts, this is a decision which should be treated like "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). It is not a decision with which this Court need occupy its time.<sup>6</sup>

— o —

<sup>6</sup> Volt urges this Court to avoid a summary disposition of this case because it would amount to an "adjudication on the merits that establishes a binding precedent for the adjudication of all future cases raising the same issue." The California Supreme Court's order makes that argument a non sequitur: one cannot use as precedent what cannot be cited as precedent.

In any event, Volt has not accurately stated the law in this regard. In *Edelman v. Jordan*, 415 U.S. 651, 671 (1974), the Court observed that, while summary affirmances not discussing the issues "obviously are of precedential value, . . . [e]qually obviously they are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), makes clear that "a summary affirmance is an affirmance of the judgment only," not necessarily of "the reasoning by which it was reached."

## CONCLUSION

This appeal should be dismissed or the judgment below should be summarily affirmed.

Dated: March 4, 1988.

Respectfully submitted,

McCutchen, Doyle, Brown  
& Enersen

David M. Heilbron  
(Counsel of Record)

Lynn H. Pasahow

Stephen L. Godchaux

Three Embarcadero Center

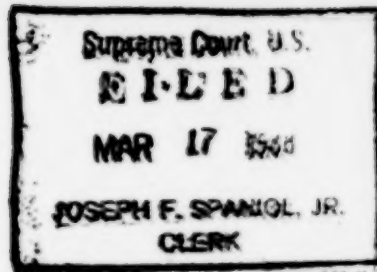
San Francisco, CA 94111

Telephone: (415) 393-2000

*Counsel for Appellee*

*The Board of Trustees of the  
Leland Stanford Junior  
University*

No. 87-1318



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

---

VOLT INFORMATION SCIENCES, INC.,  
Appellant,

vs.

BOARD OF TRUSTEES OF LELAND STANFORD  
JUNIOR UNIVERSITY, Appellee.

---

ON APPEAL FROM THE  
COURT OF APPEAL OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

---

APPELLANT'S BRIEF IN OPPOSITION  
TO MOTION TO DISMISS OR AFFIRM

JAMES E. HARRINGTON  
(Counsel of Record)  
ROBERT B. THUM  
DEANNE M. TULLY  
PETTIT & MARTIN  
101 CALIFORNIA STREET  
SAN FRANCISCO, CA 94111  
PHONE: (415) 434-4000

COUNSEL FOR APPELLANT

LIST OF AFFILIATED COMPANIES  
(Rule 28.1)

Appellant Volt Information Sciences, Inc., is a publicly owned corporation, incorporated in the State of New York. Its subsidiaries (other than wholly owned subsidiaries and wholly owned subsidiaries of wholly owned subsidiaries) are the following: Autologic, Inc., a California corporation; Long Beach Blueprint Company, a California corporation; DataNational Corporation, a Pennsylvania corporation; and Courtney's Pty., Ltd., an Australian corporation. Appellant is also a 50 per cent participant in the following joint ventures: UV Associates, a Missouri joint venture; Australian Directory Services, an Australian joint venture; VNM Directory Support Services, a Nevada joint venture; Pacific Volt Information Systems, a California joint venture; and UVA Company, a Georgia joint venture.

## TABLE OF CONTENTS

I. Introduction	1
II. Stanford's Erroneous Assertion That Dismissal of This Appeal Would Have No Precedential Effect Because the Decision of the Court Below "Does Not Exist"	1
III. Stanford's Unfounded Accusation That Volt Has Made a "False" Factual Assertion in Its Jurisdictional Statement	10
IV. Conclusion	12



## TABLE OF AUTHORITIES

### Cases

Ammex Warehouse Co. v. Gallman, 414 U.S. 802 (1973)	9
Hicks v. Miranda, 422 U.S. 332 (1975)	7-8
Jendralski v. Black, 222 Cal.Rptr. 396 (1986)	4
McKenna v. Straughan, 222 Cal.Rptr. 462 (1986)	4
Miller v. California, 418 U.S. 915 (1974)	8
Tietgen v. City of Pomona, 222 Cal. Rptr. 368 (1986)	4
Tully v. Griffin, 429 U.S. 68 (1976)	8-9

### Statutes and Rules

Cal. Rules of Court, Rule 976	2
Cal. Rules of Court, Rule 977	2,3,6
Cal. Rules of Court, Rule 978	2

### Articles

Biggs, Censoring the Law in California: Decertification Revisited, 30 Hast.L.J. 1577 (1979)	2,3,6
Note, Decertification of Appellate Opinions, 50 S.Cal.L.Rev. 1181 (1977)	2,3,6

## I. Introduction

Most of the arguments advanced in Stanford's Motion to Dismiss or Affirm have been adequately anticipated in Volt's Jurisdictional Statement and therefore require no further response. There are two exceptions to this generalization. The first of these consists of Stanford's contention that dismissal of this appeal would have no precedential effect because the decision of the court below, having been "de-published" by the California Supreme Court, "in essence does not exist" (Motion to Dismiss, pp. 7, 16). The second argument that requires a response consists of Stanford's accusation that Volt has made a "false" assertion in its Jurisdictional Statement regarding the facts of the underlying transaction between the parties (id., p. 13n.3). The remainder of this brief will be devoted to a refutation of these two arguments.

## II. Stanford's Erroneous Assertion That Dismissal of This Appeal Would Have No Precedential Effect Because the Decision of the Court Below "Does Not Exist"

The California appellate courts, like the appellate courts of many other jurisdictions,

follow a practice of selective publication of their opinions. Cal. Rules of Court, Rules 976-978. Under this practice, only those opinions that satisfy certain stringent criteria are permitted to be published in the official California Appellate Reports, and these have historically included only a small minority of the opinions that have actually been issued by the appellate courts. Id., Rule 976(b). See Note, Decertification of Appellate Opinions, 50 S.Cal.L.Rev. 1181, 1182n.11 (1977). The initial decision whether to certify an opinion of a court of appeal for publication is made by the court that rendered it, but this decision may be overruled by the Supreme Court, which has the power to order that "[a]n opinion certified for publication shall not be published, [or that] an opinion not so certified shall be published." Id., Rule 976(c)(2). The Supreme Court very frequently exercises this power to "de-certify" or "de-publish" opinions previously certified for publication by the courts of appeal, and this is typically done by simply including a

directive to this effect in the same order in which the court denies the petition for review of the court of appeal's decision. Note, supra, 50 S.Cal.L.Rev. at 1184n.17, 1200-6; Biggs, Censoring the Law in California: Decertification Revisited, 30 Hast.L.J. 1577, 1577-78 (1979).

When an opinion of a court of appeal is not published, whether by reason of the court of appeal's initial failure to certify it for publication or by reason of a de-certification order of the Supreme Court, it is not allowed to be cited as precedent in any other proceeding in the California courts. Cal. Rules of Court, Rule 977(a). However, it retains its status as a dispositive adjudication of the rights of the parties in the case in which it was rendered, and additionally remains effective for purposes of applying the doctrines of law of the case, res judicata, and collateral estoppel. Id., Rule 977(b). See Note, supra, 50 S.Cal.L.Rev. at 1186; Biggs, supra, 30 Hast.L.J. at 1580.

In this case, the court of appeal initially

certified its opinion for publication, and it was accordingly published in both the advance-sheet edition of the official California Appellate Reports and in the West's California Reporter (J.S. App. A, p. 1; 195 Cal.App.3d 349; 240 Cal.Rptr. 558). However, when the Supreme Court thereafter entered its order denying Volt's petition for review of the court of appeal's decision, it included therein a further order to the effect that that the court of appeal's opinion should not be published in the permanent edition of the California Appellate Reports (J.S. App. B). The opinion will therefore not be published in the official reports, although it will of course remain published in the unofficial West's California Reporter with a notation indicating its "depublication" by the Supreme Court. See, e.g., Tietgen v. City of Pomona, 222 Cal.Rptr. 368 (1986); Jendralski v. Black, 222 Cal.Rptr. 396 (1986); McKenna v. Straughan, 222 Cal.Rptr. 462 (1986).

Stanford argues that the Supreme Court's entry of an order foreclosing official



publication of the court of appeal's opinion means, in effect, that the decision "in essence does not exist" for any purpose relevant to this appeal (Motion to Dismiss or Affirm, pp. 7, 16). Stanford further argues that, because of this allegedly "non-existent" status of the decision, an order of this Court dismissing this appeal would not have the usual effect of establishing a binding precedent on the issues raised by the appeal (id.). As will now be shown, both of these arguments are wholly unsound, the first because it ignores the relevant provisions of the California rules governing the dispositive status of unpublished opinions, and the second because it flatly contravenes the decisions of this Court concerning the precedential effect of dismissals of appeals from unpublished opinions of the lower courts.

The first of Stanford's arguments is effectively belied by what has already been said regarding the status accorded by the California rules to unpublished opinions of the California courts of appeal. As noted above,

the fact that a court of appeal's opinion is not published in the official Appellate Reports does not detract in any wise from its status as a dispositive determination of the rights of the parties in the particular case under adjudication. Cal. Rules of Court, Rule 977(b); Note, supra, 50 S.Cal.L.Rev. at 1186; Biggs, supra, 30 Hast.L.J. at 1580.

Accordingly, the court of appeal's decision in the present case constitutes a fully dispositive decision on the arbitrability of the pending dispute between Volt and Stanford which will, unless reversed by this Court, result in a deprivation of Volt's federally guaranteed right to arbitrate this dispute that is every bit as final and effective as it would have been if the opinion had been published. Id.. Except perhaps in some Pickwickian sense, therefore, there is no truth whatever to Stanford's assertion that the decision "does not exist" for purposes of the present appeal.

Stanford's additional argument that the non-publication of the court of appeal's opinion would also eliminate the precedential

value of an order of this Court dismissing this appeal is likewise demonstrably erroneous. This argument, first of all, makes the obviously unwarranted assumption that the precedential standing of orders issued by this Court is somehow determined by state-created rules governing the publication and citation of opinions of the state appellate courts. More importantly, the argument flies in the face of at least two decisions of this Court which squarely hold that orders dismissing appeals from decisions of the lower courts constitute binding precedents on the issues raised by such appeals notwithstanding the fact that the opinions of the lower courts in those cases were unpublished and therefore not citable as precedents in their own right.

Thus, as it happens, this Court's leading decision on the precedential effect of such summary dismissals in Hicks v. Miranda, 422 U.S. 332 (1975), involved a dismissal of an appeal from an unpublished opinion of a California appellate court which was subject to precisely the same state-law rules regarding

the publication and citation of appellate opinions as is the opinion of the court of appeal in this case. In that case, this Court held that its earlier dismissal of the appeal from an unpublished opinion of the Appellate Department of the California Superior Court in Miller v. California, 418 U.S. 915 (1974), had established a precedent binding on the lower courts with respect to each of the issues adjudicated in that earlier case. Hicks v. Miranda, supra, 422 U.S. at 343-45. The fact that the opinion of the lower appellate court in the Miller case, like the lower court's opinion in this case, was itself deprived of precedential value by state-law restrictions on the citation of unpublished opinions was simply disregarded by this Court in rendering its decision on the precedential effect of its own order dismissing the appeal in that case. Id.. See Cal. Rules of Court, Rule 977(a). The Court's holding in this regard was subsequently reaffirmed in Tully v. Griffin, 429 U.S. 68 (1976), where the Court likewise held that a "controlling precedent" had been established by

its earlier summary affirmance of a decision of a federal district court in Ammex Warehouse Co. v. Gallman, 414 U.S. 802 (1973), despite the fact that the decision below in the Ammex case was itself unpublished and therefore unavailable for citation as precedent. Tully v. Griffin, supra, 429 U.S. at 74.

These decisions of this Court effectively demonstrate that the lower courts' rules and practices concerning the publication and citation of their opinions have no effect whatever on the precedential standing of this Court's orders dismissing appeals from unpublished opinions. Under these decisions, such orders have been accorded just as much precedential value as similar orders of this Court disposing of appeals from published decisions of the lower courts. It follows that any order this Court may issue dismissing the present appeal would effectively enshrine as the law of the land the court of appeal's disposition of the issue raised in this case notwithstanding the fact that the lower court's opinion is itself unpublished and therefore



without precedential value as a matter of state law. Stanford's argument that the allegedly "non-existent" status of the court of appeal's opinion would somehow forestall this result must accordingly be rejected.

III. Stanford's Unfounded Accusation That Volt Has Made a "False" Factual Assertion in Its Jurisdictional Statement

In its Jurisdictional Statement, in the course of refuting the court of appeal's unfounded suggestion that the parties consciously "chose" to exclude their contract from the coverage of the Federal Arbitration Act, Volt made the following statements (Jurisdictional Statment, pp. 54-55):

The court [of appeal] itself acknowledges that neither party presented any direct evidence of the intent underlying the adoption of either the choice-of-law clause or the arbitration clause (App. A, p. 5). Indeed, since the personnel who executed the contract were construction executives and not lawyers (JA 22), it may fairly be presumed that they had never heard of either Calif. Code Civ. Proc. §1281.2(c) or the contrary provisions of the Federal Arbitration Act, and consequently had no clear idea of the potential significance of the choice-of-law clause with respect to the enforceability of their agreement to arbitrate their dispute.

In its Motion to Dismiss or Affirm, Stanford characterizes these statements as

embodying a "false" assertion of fact  
(Stanford's motion, p. 13n.3). In that regard,  
Stanford states (id.):

Volt asserts that the parties would not have been aware of Calif. Code Civ. Proc. §1281.2(c) because those who "prepared" the contract were not lawyers, citing to JA 22. (Jur. St., pp. 54-55) JA 22 is simply the signature page of the contract. There is no evidence to support Volt's assertion, and it is in fact false.

A comparison of these two passages from the parties' briefs will readily reveal that Stanford's accusation of falsehood against Volt is in fact based upon a flagrant misquotation of Volt's Jurisdictional Statement. Volt did not assert, as Stanford incorrectly claims, that the contract was "prepared" by non-lawyers, and Volt admittedly has no idea who "prepared" the contract, most of which, including the choice-of-law clause, was simply adopted from a standard-form construction agreement promulgated by the American Institute of Architects (JA 39). Rather, Volt merely stated that the contract was "executed" by non-legal personnel of the parties, and this statement is fully supported by Volt's citation of the contract's signature page, which

identifies the signatories as Volt's "Division Manager" and Stanford's "V.P. of Business and Finance" (JA 22).

Thus, the statement Volt actually made in its brief is quite true and properly attested by the record, while Stanford's own accusation of deceit is the only thing in this whole scenario that may accurately be described as "false." The caster of stones thus turns out to inhabit a glass house.

#### IV. Conclusion

For the reasons stated herein and in Volt's Jurisdictional Statement, the Court should either grant a plenary hearing of this appeal or summarily reverse the decision of the court below.

Dated: March 17, 1988

Respectfully submitted,

JAMES E. HARRINGTON  
ROBERT B. THUM  
DEANNE M. TULLY  
PETTIT & MARTIN

Attorneys for Appellant

5  
No. 87-1318

Supreme Court, U.S.  
FILED

MAY 11 1988

JOSEPH A. SPANIO, JR.  
CLERK

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1987

---

VOLT INFORMATION SCIENCES, INC.,  
Appellant,

vs.

BOARD OF TRUSTEES OF LELAND STANFORD  
JUNIOR UNIVERSITY, Appellee.

---

ON APPEAL FROM THE  
COURT OF APPEAL OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

---

JOINT APPENDIX

JAMES E. HARRINGTON  
(Counsel of Record)  
ROBERT B. THUM  
DEANNE M. TULLY  
PETTIT & MARTIN  
101 CALIFORNIA STREET  
SAN FRANCISCO, CA 94111  
PHONE: (415) 434-4000  
COUNSEL FOR APPELLANT

DAVID M. HEILBRON  
(Counsel of Record)  
LYNN H. PASAHOW  
STEPHEN L. GODCHAUX  
MCCUTCHEN, DOYLE,  
BROWN & ENERSEN  
3 EMBARCADERO CENTER  
SAN FRANCISCO, CA 94111  
PHONE: (415) 393-2000  
COUNSEL FOR APPELLEE

---

JURISDICTIONAL STATEMENT FILED FEBRUARY 8, 1988  
JURISDICTION POSTPONED MARCH 28, 1988

5987

## TABLE OF CONTENTS

Docket Entries from the Courts Below	1
Stanford's Complaint in the Superior Court	5
Excerpts from the Contract Between the Parties (filed in superior court as exhibit to Stanford's complaint)	28
Volt's Petition to Compel Arbitration and Stay Action	41
Volt's Demand for Arbitration (filed in superior court as exhibit to Volt's petition to compel arbitration)	48
Affidavit of Eugene Curran (filed in superior court as attachment to Volt's petition to compel arbitration)	53
Order of the Superior Court denying Volt's Petition to Compel Arbitration	58
Opinion of the California Court of Appeal, Sixth Appellate District	61
Order of the California Supreme Court Denying Volt's Petition for Review	86



DOCKET ENTRIES  
FROM THE COURTS BELOW

---

DOCKET ENTRIES FROM  
THE CALIFORNIA SUPERIOR COURT

The clerk of the California Superior Court for Santa Clara County does not maintain lists of docket entries. The following list of relevant docket entries prepared by counsel is provided in its stead:

September 4, 1986 - Complaint filed by plaintiff Board of Trustees of Leland Stanford Junior University.

October 7, 1986 - Petition to Compel Arbitration and Stay Action filed by defendant Volt Information Sciences, Inc.

November 21, 1986 - Order filed by court denying petition to compel arbitration

December 5, 1986 - Notice of Appeal filed by defendant

DOCKET ENTRIES FROM THE  
CALIFORNIA COURT OF APPEAL

December 15, 1986 - Notice of appeal received

February 17, 1987 - Record on appeal filed

February 19, 1987 - Appellant's Opening Brief filed by appellant

February 26, 1987 - Joint Appendix filed

March 9, 1987 - Motion to expedite appeal filed by appellant

April 6, 1987 - Order granting motion to expedite appeal filed by court

April 6, 1987 - Respondent's Brief filed by respondent

May 22, 1987 - Appellant's Reply Brief filed by appellant

July 16, 1987 - Cause argued and submitted

October 5, 1987 - Opinion filed by the court (affd. 1, 2; 3 disntd.)

November 12, 1987 - Appellant's Petition for Review by Supreme Court received

November 25, 1987 - Application for leave to file amicus brief and amicus brief received

December 3, 1987 - Answer to Petition for Review received

December 18, 1987 - Petition for review denied by Supreme Court; reporter of decisions directed not to publish opinion

December 21, 1987 - Remittitur issued

December 22, 1987 - Record returned from clerk of Supreme Court

January 14, 1987 - Notice of Appeal to United States Supreme Court filed by appellant

February 17, 1987 - Notice of filing of appeal received from U.S. Supreme Court

DOCKET ENTRIES FROM THE  
CALIFORNIA SUPREME COURT

November 12, 1987 - Petition for Review filed by  
petitioner

November 25, 1987 - Application for Leave to  
File Amicus Brief and Amicus Brief filed by  
Associated General Contractors

December 2, 1987 - Answer to petition for Review  
filed by respondent

December 17, 1987 - Petition denied; court of  
appeal opinion decertified

STANFORD'S COMPLAINT  
IN THE SUPERIOR COURT

---



McCUTCHEN, DOYLE, BROWN & ENERSEN  
DAVID M. HEILBRON  
LYNN H. PASAHOW  
STEPHEN L. GODCHAUX  
Three Embarcadero Center  
San Francisco, California 94111  
Telephone: (415) 393-2000

(ENDORSED)  
F I L E D  
SEP 4 1986  
GRACE YAMAKAWA  
County Clerk

Attorneys for Plaintiff  
The Board of Trustees of The  
Leland Stanford Junior University

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

THE BOARD OF TRUSTEES	)	
OF THE LELAND STANFORD	)	
JUNIOR UNIVERSITY, a	)	No. P 48603
body having corporate	)	
powers,	)	COMPLAINT FOR DECLARA-
	)	TORY JUDGMENT; FRAUD;
Plaintiff,	)	ESTOPPEL; ENTERING
	)	INTO A CONTRACT WITH-
v.	)	OUT INTENT TO PERFORM;
	)	BREACH OF COVENANT OF
VOLT INFORMATION	)	GOOD FAITH AND FAIR
SCIENCES, INC., TELE-	)	DEALING; BAD FAITH
COMMUNICATIONS INTER-	)	DENIAL OF EXISTENCE
NATIONAL, INC., BRIAN-	)	OF A CONTRACT; AND
KANGAS-FOULK & ASSO-	)	<u>BREACH OF CONTRACT</u>
CIATES, and DOES I	)	
through XX, inclusive,	)	
	)	
Defendants.	)	
	)	

The Board of Trustees of The Leland Stanford Junior University alleges as follows:

GENERAL ALLEGATIONS

1. The Board of Trustees of The Leland Stanford Junior University ("Stanford") is a body having corporate powers under the laws of the State of California. It is a nonprofit educational institution, and its principal campus and situs are at the Stanford campus, in the County of Santa Clara, California.

2. Defendant Volt Information Sciences, Inc. ("Volt") is a corporation organized and existing under the laws of the State of New York, with a principal place of business in the State of New York, authorized to do business and doing business in the State of California, County of Santa Clara.

3. Defendant Telecommunications International, Inc. ("TII") is a corporation organized and existing under the laws of the State of California, with a principal place of business in the State of Colorado, authorized to

do business. and doing business in the State of California, County of Santa Clara.

4. Defendant Brian-Kangas-Foulk and Associates ("BKF&A") is a corporation organized and existing under the laws of the State of California, with a principal place of business in the State of California, authorized to do business and doing business in the State of California, County of Santa Clara.

5. Stanford does not know the true names and capacities of defendants sued herein as Does I through XX, inclusive, and therefore sues these defendants by such fictitious names. Stanford will seek leave to amend this complaint to allege their true names and capacities when ascertained.

6. Stanford is informed and believes and on that basis alleges that at all times herein mentioned, each of the defendants including the fictitiously named defendants was the agent, servant or employee of each of the remaining defendants, and in doing the acts alleged in this complaint was acting within the

course and scope of such agency.

7. The transactions which are the subject of this Proceeding are to be carried out in the County of Santa Clara at the Stanford campus, which is within the Palo-Alto Mountain View-Los Altos Judicial District of the County of Santa Clara.

8. On or about July 10, 1984, Stanford and Volt entered into a Construction Contract ("Contract") in connection with the construction of a conduit distribution system ("the conduit distribution system") on the Stanford campus. A true and correct copy of portions of the Contract, including the Conditions of the Contract (General, Supplementary and other Conditions) is attached as Exhibit "A" and incorporated by reference.

9. On or about April 17, 1985, Stanford gave Volt written notice of termination ("Termination Notice") of the Contract for cause. A true and correct copy of the Termination Notice is attached as Exhibit "B" and incorporated by reference.

10. In or about April, 1985, subsequent to the sending of the Termination Notice, meetings and telephone conversations were held between representatives of Stanford and Volt. During the meetings and conversations, Volt representatives stated it was Volt's desire to complete the subject work and perform at Volt's sole expense all corrective work necessary to comply with the Contract.

11. On or about April 29, 1985, Stanford and Volt entered into a Reinstatement Agreement ("Agreement"). A true and correct copy of the Agreement is attached as Exhibit "C" and incorporated by reference.

12. On or about April 14, 1986, Volt presented to Stanford a Claim for Additional Compensation ("Claim") in the amount of \$3,916,190.65. On or about August 27, 1986, Volt presented to Stanford a demand for Arbitration ("Arbitration demand") for damages in the same amount. In both the Claim and Arbitration Demand Volt contends it is entitled



to additional compensation for work performed as to which Volt agreed in the Agreement it would not be paid. A true and correct copy of the Arbitration Demand is attached as Exhibit "D" and incorporated reference.

13. On or about March 11, 1983, Stanford and TII entered into a Consulting Contract ("TII Contract") in connection with the construction of the conduit distribution system. A true and correct copy of the TII Contract is attached as Exhibit "E" and incorporated by reference. The TII Contract provided that TII would furnish the design for the conduit distribution system. On or about April 25, 1983, TII and BKF&A entered into a sub-consultant contract ("TII-BKF&A Contract") which Provided that BKF&A would furnish the design for the conduit distribution system. A true and correct copy the TII-BKF&A Contract is attached as Exhibit "F" and corporated by reference.

14. On or about October 10, 1984, TII and Stanford entered into an Engineering

Consulting Contract ("TII Engineering Contract") which provided that TII would perform implementation, management and supervision in connection with the construction of the conduit distribution system. A true and correct copy of the TII Consulting Contract is attached as Exhibit "G" and incorporated by reference.

FIRST CAUSE OF ACTION AGAINST VOLT

DECLARATORY RELIEF

15. Stanford reasserts the allegations in paragraphs 1 through 12 of its General Allegations, and incorporates them by reference as though fully set forth.

16. An actual controversy exists among the parties concerning the Agreement and the amount due under the Contract as follows:

(a) Stanford contends that the Agreement is a binding contract that continues to govern the rights and obligations of the parties; Volt contends the Agreement is a nullity.

(b) Stanford contends that any sum allegedly due Volt was waived and released

by the Agreement and that Stanford is not indebted to Volt in any sum or sums whatever; Volt contends that Stanford is obligated to pay it the amount of \$3,916,190.65.

17. Stanford asks that this Court make its declaration determining the rights and obligations of the parties pursuant to the provisions of Section 1060, California Code of Civil Procedure. A determination of the rights of the parties will be in the interests of justice.

WHEREFORE, Stanford prays for judgment against Volt, as set forth below.

SECOND CAUSE OF ACTION AGAINST VOLT

FRAUD

18. Stanford reasserts the allegations in paragraphs 1 through 12 of its General Allegations, and incorporates them by reference as though fully set forth.

19. In the course of the meetings and telephone calls described in paragraph 10, above, and in the Agreement, Volt falsely and fraudulently represented to Stanford a material

fact, and made a promise about a material matter without any intention of performing it. More specifically, Volt represented and promised that, if Stanford reinstated Volt under the Contract and permitted Volt to complete the work it contracted to perform, Volt intended to and would perform, at its sole expense, all corrective work necessary to comply with the Contract.

20. The representation described in paragraph 19, above, was false and the promise described in paragraph 19, above, was made without any intention of performing it in that, at the time it made the representation, Volt had no intention to perform at its sole expense all corrective work necessary to comply with the Contract; instead, Volt intended to demand that Stanford reimburse it for the expenses of the corrective work necessary to comply with the Contract.

21. Volt knew when it made the representation and promise described in paragraph 19 above, that the representation was

false and the promise was made without any intention of performing it.

22. The representation and promise described in paragraph 19, above, were made by Volt with intention of defrauding Stanford and inducing it to believe that, if Stanford reinstated Volt under the Contract and permitted Volt to complete the work it contracted to perform, Volt intended to and would perform, at its sole expense, all corrective work necessary to comply with the Contract.

23. Volt made the representation and promise described in paragraph 19, above, in order to induce Stanford to reinstate Volt under the Contract and enter into the Agreement.

24. In reliance upon the representation and promise described in paragraph 19, above, Stanford entered into the Agreement and reinstated Volt under the contract. At the time it did so, Stanford was not aware that the representation was false or that Volt did not intend to perform its promise.

25. As a result of its reliance on



Volt's representation and promise described in paragraph 19, above, Stanford has been damaged in that it will be required to incur expenses, including attorneys' fees, to investigate and respond to legal claims made by Volt for compensation on account of work performed by Volt following April 17, 1986.

26. Volt's actions, described above, were taken with malice, oppression and fraud, as defined by California Civil Code Section 3294, entitling Stanford to exemplary damages.

WHEREFORE, Stanford prays for judgment against Volt, as set forth below.

THIRD CAUSE OF ACTION AGAINST VOLT

ESTOPPEL

27. Stanford reasserts the allegations in paragraphs 1 through 12 of its General Allegations, and in paragraphs 19 through 26, and incorporates them by reference as though fully set forth.

28. The fraudulent conduct alleged in paragraphs 19 through 26, above, has misled

Stanford to its prejudice. Stanford asks that the Court estop Volt from taking advantage of its own fraudulent conduct by repudiating the Agreement. Stanford asks that the Court give the Agreement full force and effect.

WHEREFORE, Stanford prays for judgment against Volt, as set forth below.

FOURTH CAUSE OF ACTION AGAINST VOLT  
ENTERING INTO CONTRACT WITHOUT INTENT  
TO PERFORM.

29. Stanford reasserts the allegations in paragraphs 1 through 12 of its General Allegations, and in paragraphs 19 through 26, and incorporates them by reference as though fully set forth.

30. Volt entered into the Agreement with Stanford without intent to perform its obligation under the Agreement to perform at its sole expense all corrective work necessary to comply with the Contract.

31. Volt has failed to perform its obligation to perform at its sole expense all corrective work necessary to comply with the Contract.

32. As a direct and proximate result of Volt's failure to perform its obligation, Stanford has been damaged in that it will be required to incur expenses, including attorneys' fees, to investigate and respond to legal claims made by Volt for compensation on account of work performed by Volt following April 17, 1986.

33. Volt's actions, described above, were taken with malice, oppression and fraud, as defined by California Civil Code Section 3294, entitling Stanford to exemplary damages.

WHEREFORE, Stanford prays for judgment against Volt, as set forth below.

FIFTH CAUSE OF ACTION AGAINST VOLT

BREACH OF COVENANT OF GOOD FAITH  
AND FAIR DEALING, BAD FAITH DENIAL  
OF EXISTENCE OF CONTRACT

34. Stanford reasserts the allegations in paragraphs 1 through 12 of its General Allegations, and in paragraphs 19 through 26, and incorporates them by reference as though fully set forth.

35. The Agreement included an implied covenant of good faith and fair dealing that

neither party would take any action which would deny the right of the other party to receive the benefits intended by that Agreement.

36. Stanford participated in the meetings and telephone conversations described in paragraph 10, above, in a good faith effort to reinstate Volt under the Contract, and relied upon the representation and promise described in paragraph 19, above, in entering the Agreement and reinstating Volt under the Contract.

37. Stanford has fulfilled the implied covenant of good faith and fair dealing by performing all conditions, covenants, and promises required on its part to be performed in accordance with the terms and conditions of the Agreement.

38. By presenting to Stanford the Claim seeking, and demanding arbitration to recover, compensation on account of work performed by Volt following April 17, 1986, Volt has breached the implied covenant of good faith and fair dealing in the Agreement.

39. In an attempt to shield itself

from liability for its fraudulent conduct, Volt has denied, in bad faith and without probable cause, that the Agreement exists as a binding contract. By its bad faith denial of the existence of the Agreement, Volt has compelled Stanford to bring this action.

40. As a direct and proximate result of Volt's breach of the implied covenant of good faith and fair dealing and its denial of the existence of the Agreement, Stanford has been damaged in that it will be required to incur expenses, including attorneys' fees, to investigate and respond to legal claims made by Volt for compensation on account of work performed by Volt following April 17, 1986.

41. Volt's breach of the implied covenant of good faith and fair dealing and its bad faith denial of the existence of the Agreement were done with malice, oppression and fraud, as defined by California Civil Code Section 3294, entitling Stanford to exemplary damages.

WHEREFORE, Stanford prays for judgment



against Volt, as set forth below.

SIXTH CAUSE OF ACTION AGAINST VOLT

BREACH OF CONTRACT

42. Stanford reasserts the allegations in paragraphs 1 through 12 of its General Allegations, and in paragraphs 19 through 26, and incorporates them by reference as though fully set forth.

43. Volt breached the Contract and Agreement by, among other things, failing to perform work required by the Contract and by failing to complete the conduit distribution system within the time periods specified in the Contract and Agreement.

44. Stanford has performed all its obligations under the Contract and Agreement.

45. As a result of Volt's breaches of the Contract and Agreement Stanford has been damaged in an amount not yet fully known, but in any case not less than \$50,000.

WHEREFORE, Stanford prays for judgment against Volt, as set forth below.

SEVENTH CAUSE OF ACTION AGAINST TII AND BKF&A

DECLARATORY RELIEF

46. Stanford reasserts the allegation in paragraphs 1 through 14 of its General Allegations, and incorporates them by reference as although fully set forth.

47. In the Claim and in the Arbitration Demand Volt contends that among the reasons Stanford is indebted to Volt are that the design for the conduit distribution system furnished by TII and/or BKF&A was defective, and that the field directions provided by TII during the course of construction were defective.

48. Stanford is informed and believes and thereon alleges that an actual controversy exists between Stanford and defendants TII and BKF&A, in that Stanford contends, and TII and BKF&A deny the following:

(a) That, if Stanford is liable to Volt for Volt's damages as alleged in the Claim or Arbitration Demand, which Stanford denies, TII and/or BKF&A breached its obligation to furnish a proper design of the conduit

distribution system, and TII breached its obligation to provide proper field directions during the course of construction of the conduit distribution system.

(b) That, if Stanford is liable to Volt for its damages as alleged in the Claim or Arbitration Demand, which Stanford denies, TII and/or BKF&A is obligated to indemnify Stanford for all sums which Stanford pays or may be compelled to pay as a result of any damages, judgments or other awards recovered by Volt.

49. Stanford desires a judicial determination of the respective rights and duties of Stanford and of TII and BKF&A, and each of them, with respect to the sums allegedly owed in Volt's Claim or Arbitration Demand.

50. Such a declaration is necessary and appropriate at this time in order that Stanford may ascertain its rights and duties with respect to the claim of Volt for sums owed under the Contract. The claim of Volt and the claim of Stanford arise out of the same occurrence, and determination of both in one

proceeding is necessary and appropriate in order to avoid the circuitry and multiplicity of actions that would result if Stanford is required now to litigate the claims of Volt, and later to bring a separate action against TII and BKF&A for indemnification.

WHEREFORE, Stanford prays for judgment against TII and BKF&A, as follows:

PRAYER FOR RELIEF

FIRST CAUSE OF ACTION AGAINST VOLT:

1. For a judgment declaring: that the Agreement is a binding contract that continues to govern the rights and obligations of the parties; that the Agreement waived and released Volt's claims in the Claim and Arbitration Demand; and that Stanford is not indebted to Volt in any sum or sums whatever; and

2. For costs of suit and such other and further relief as the Court deems just.

SECOND CAUSE OF ACTION AGAINST VOLT:

1. For actual damages in the amount proven at trial;

2. For exemplary damages in the

amount allowed by the Court; and

3. For costs of suit and such other and further relief as the Court deems just.

THIRD CAUSE OF ACTION AGAINST VOLT:

1. For an order estopping Volt from repudiating the Agreement and giving full force and effect to the Agreement.

2. For costs of suit and such other and further relief as the Court deems just.

FOURTH CAUSE OF ACTION AGAINST VOLT:

1. For actual damages in the amount proven at trial;

2. For exemplary damages in the amount allowed by the Court; and

3. For costs of suit and such other and further relief as the Court deems just.

FIFTH CAUSE OF ACTION AGAINST VOLT:

1. For actual damages in the amount proven at trial;

2. For exemplary damages in the amount allowed by the Court; and

3. For costs of suit and such other and further relief as the Court deems just.



SIXTH CAUSE OF ACTION AGAINST VOLT

1. For actual damages in the amount proven at trial;
2. For costs of suit and such other and further relief as the Court deems just.

SEVENTH CAUSE OF ACTION AGAINST TII  
AND BKF&A:

1. For a judgment declaring: that, if Stanford is held liable to Volt as alleged in Volt's Claim or Arbitration demand, which Stanford denies, TII and/or BKF&A breached its obligation to furnish a proper design of the conduit distribution system, and TII breached its obligation to provide proper field directions during the course of construction of the conduit distribution system; and that, if Stanford is liable to Volt for Volt's damages as alleged in the Claim or Arbitration Demand, which Stanford denies, TII and/or BKF&A is obligated to indemnify Stanford for all sums which Stanford pays or may be compelled to pay as a result of any damages, judgments or other awards recovered by Volt.

2. For costs of suit and such other  
and further relief as the Court deems just.

Dated: September 3, 1986.

McCUTCHEN, DOYLE, BROWN & ENERSEN

By /s/ David M. Heilbron  
David M. Heilbron  
Attorneys for Plaintiff  
The Board of Trustees of the  
Leland Stanford Junior University

EXCERPTS FROM THE CONTRACT  
BETWEEN THE PARTIES

---

(filed in Superior Court as  
exhibit to Stanford's Complaint)

---

Contract Number: FC-3842  
Project Number: 2240

CONSTRUCTION CONTRACT

CONDUIT DISTRIBUTION SYSTEM

(Lump Sum)

THIS CONTRACT, made and entered into as of the 10th day of July, 1984, by and between THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY, a body having corporate powers under the laws of the State of California, hereinafter referred to as the "Owner" and VOLT INFORMATION SCIENCES, INC., 2160 Venture Drive, Memphis, Tenn 38131 hereinafter referred to as the "Contractor," License No. 349954 C61.

4.1 WITNESSETH

RECITALS:

A. The Owner proposes to proceed with the construction of a communication conduit system hereinafter referred to as the "Project" or the "Work."

B. The Contractor desires to construct the work (as defined in Article 1.1.3 of the General Conditions) and represents to the Owner that he has fully familiarized himself with the Contract, has visited and carefully inspected the site and premises of the Work, and has fully satisfied himself concerning any and all existing conditions which might in any manner affect the Work.

NOW THEREFORE, Owner and Contractor, for and in consideration of their mutual promises and for other valuable consideration, the receipt whereof is hereby acknowledged, agree as set forth below.

#### 4.2 THE CONTRACT DOCUMENTS

The Contract Documents consist of this Contract, Conditions of the Contract (General, Supplementary and other Conditions), Detailed Drawings, Technical Specifications, all Addenda issued prior to execution of this Contract and all Modifications issued subsequent thereto. These form the Contract, and all are as fully a part of the Contract Documents as if attached to this Agreement or repeated herein. An enumeration of the Contract Documents appears in Section 4.11.. If anything in the conditions of the contract is inconsistent with this Agreement, the Agreement shall govern.

#### 4.3 CONTRACTOR'S AGREEMENT

The Contractor agrees to furnish all labor, materials, tools, supplies, equipment, transportation, supervision, technical, professional and other services; and shall perform all of the work required by the Contract Documents.

#### 4.4 PROJECT MANGER/CONSTRUCTION MANAGER

The Project Manager is:

Terry Vernon  
Old Pavilion  
Stanford, California 94305

The Engineer is:

Brian, Kangas, Foulk Associates  
595 Price Avenue  
Redwood City, California 94063  
(415) 365-0412

The Construction Manager is:

Bechtel  
Don Hoppe  
Old Pavilion  
Stanford, California 94305  
(415) 497-2655



The Consultant is:

Telecommunications International Inc.  
Elbow Jones  
Old Pavilion  
Stanford, California 94305  
(415) 497-0398  
(619) 741-7752 Escondido, California

#### 4.5 CONTRACTOR'S DUTIES AND STATUS

The Contractor accepts the relationship of trust and confidence established between him and the Owner by this Contract. Contractor covenants with the Owner to furnish his best skill and judgment characteristic of Contractors with expertise in performing the work, and to cooperate with the Project Manager and Engineer in furthering the interest of the Owner. Contractor agrees to furnish business administration and superintendence and to furnish at all times an adequate supply of workmen and materials. Contractor agrees to perform the work in the best and most soundest way and in the most expeditious and economical manner consistent with the interests of the Owner.

#### 4.6 TIME OF COMMENCEMENT AND COMPLETION

\* \* \*

#### 4.7 FORCE MAJEURE

\* \* \*

#### 4.8 CONTRACT SUM

The Owner shall pay the Contractor for the performance of the Work, subject to additions and deductions by Change Order as provided in the Conditions of the Contract, in current funds, the Contract Sum of NINE HUNDRED SIX THOUSAND FIVE HUNDRED SIXTY SIX DOLLARS (\$906,566.00).

#### 4.9 PAYMENTS

\* \* \*

#### 4.10 CHANGES IN THE WORK

The Owner may make changes in the work in accordance with Article 12 of the General Conditions.

#### 4.11 MISCELLANEOUS PROVISIONS

Terms used in this Contract which are defined in the Conditions of the Contract shall have the meanings designated in those Conditions.

The Contract Documents, which constitute the entire agreement between the Owner and the Contractor, are listed in Section 4.2 and, except for Modifications issued after execution of this Agreement, are enumerated as follows:

- a. Scope of Work;
- b. Instructions to Bidders;
- c. Bid dated July 10, 1984;
- d. This Contract;
- e. Construction Administration Procedures;
- f. General Conditions, AIA 1976 Edition;
- g. Supplementary General Conditions;
- h. Affirmative Action Special Conditions;
- i. Technical Specifications (by BKF&A, dated 9/21/83), as modified;
- j. Detailed Drawings CI, 2, 5, 10, 12, 14, 15, 19 to 36, 38 to 40;

It is mutually agreed that time is of the

essence of each and every portion of this Contract and of any requirements of the Contract whereby a definite and certain length of time is fixed for the performance of any act whatsoever; and, in the event an extension of time under the Contract is allowed for the completion of any work, the new time fixed by such extension shall be of the essence of this Contract.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in not fewer than triplicate as of the day and year first hereinabove written.

VOLT INFORMATION  
SCIENCES, INC.

THE BOARD OF TRUSTEES  
OF THE LELAND STANFORD  
JUNIOR UNIVERSITY

By/s/ M Jennings

By/s/ William F. Massy  
William F. Massy

Title: DIV. MGR.  
(Contractor)

V.P. Bus. & Finance  
(Owner)

I.R.S. Employer's I.D. or S.S.#  
13-5658129

## SCOPE OF WORK

### 1.1 General

Leland Stanford Junior University has embarked on a major project to upgrade most major elements of its electronic media facilities. This Electronic Communication Media (ECM) Project includes the following projects:

Replacement Telephone System Project #2239

Conduit Distribution System Project #2240

SUNet (Broad Band Data Network) Project #2015

Energy Management Control System Project #2014

New Telephone Building Project #2241

In order to allow an uninterrupted work flow, and proper scheduling of the major installations associated with the above projects, the Conduit Distribution facilities will be the initial phase of the work.

### 1.2 Scope

The work included in Project #2240, Conduit Installation Project, is the turnkey installation of a comprehensive conduit distribution system to serve the Stanford University community as defined in the Technical Specifications, the Detailed Drawings, and further detailed herein. The Contractor's area of responsibility includes all conduit, trenching, manholes, building entries, and service boxes.

### 1.3 Scheduling

In performing the work detailed herein, the Contractor shall be required, as a condition of

contract award, to perform all work in accordance with the scheduling requirements of Stanford University.

Priorities will be established for installation of specific conduit runs by Stanford. The Contractor shall perform the work in accordance with these priorities which are detailed in the Schedule of Installation, Appendix A.

Further, the Contractor should be fully aware that the scheduling is established for the convenience of Stanford, and may be changed at weekly project meetings, as needs of both parties dictate. Such changes shall invoke no penalties on Stanford University.

#### 1.4 STANDARDS AND CODES

The Bidder will attach a copy of the Bidder's Installation Guidelines, and agree to meet these guidelines as a minimum standard during installation. Stanford reserves the right to modify these standards in order to ensure the integrity of any installation efforts. All work will meet the standards and codes described in the Technical Specifications attached to this document.



THE AMERICAN INSTITUTE OF ARCHITECTS

AIA DOCUMENT A201

GENERAL CONDITIONS OF THE CONTRACT  
FOR CONSTRUCTION

THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES:  
CONSULTATION WITH AN ATTORNEY IS ENCOURAGED  
WITH RESPECT TO ITS MODIFICATION

1976 EDITION  
TABLE OF ARTICLES

1. CONTRACT DOCUMENTS
2. ARCHITECT
3. OWNER
4. CONTRACTORS
5. SUBCONTRACTORS
6. WORK BY OWNER OR BY SEPARATE CONTRACTORS
7. MISCELLANEOUS PROVISIONS
8. TIME
9. PAYMENTS AND COMPLETION
10. PROTECTION OF PERSONS AND PROPERTY
11. INSURANCE
12. CHANGES IN THE WORK
13. UNCOVERING AND CORRECTION OF WORK
14. TERMINATION OF THE CONTRACT

This document has been approved and endorsed by  
The Associated General Contractors of America

Copyright 1911, 1915, 1918, 1925, 1937, 1951,  
1958, 1961, 1963, 1966, 1967, 1970, & 1976 by  
the American Institute of Architects, 1735  
New York Avenue, N.W., Washington, D.C. 20006.  
Reproduction of the material herein or  
substantial quotation of its provisions without  
permission of the AIA violates the copyright  
laws of the United States and will be subject to  
legal prosecution.

\* \* \*

ARTICLE 4

CONTRACTOR

\* \* \*

4.6 TAXES

4.6.1 The Contractor shall pay all sales, consumer, use and other similar taxes for the Work or portions thereof provided by the Contractor which are legally enacted at the time bids are received, whether or not yet effective.

\* \* \*

ARTICLE 7

MISCELLANEOUS PROVISIONS

7.1 GOVERNING LAW

7.1.1 The Contract shall be governed by the law of the place where the Project is located.

\* \* \*

7.9 ARBITRATION

7.9.1 All claims, disputes and other matters in question between the Contractor and the Owner arising out of, or relating to, the Contract Documents or the breach thereof, except as provided in Subparagraph 2.2.11 with respect to the Architect's decisions on matters relating to artistic effect, and except for claims which have been waived by the making or acceptance of final payment as provided by Subparagraphs 9.9.4 and 9.9.5, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. No arbitration

arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, the Architect, his employees or consultants except by written consent containing a specific reference to the Owner-Contractor Agreement and signed by the Architect, the Owner, the Contractor and any other person sought to be joined. No arbitration shall include, by consolidation, joinder or in any other manner, parties other than the Owner, the Contractor and any other persons substantially involved in a common question of fact or law, whose presence is required if complete relief is to be accorded in the arbitration. No person other than the Owner or Contractor shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Any consent to arbitration involving an additional person or persons shall not constitute consent to arbitration of any dispute not described therein or with any person not named or described therein. The foregoing agreement to arbitrate and any other agreement to arbitrate with an additional person or persons duly consented to by the parties to the Owner-Contractor Agreement shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

7.9.2 Notice of the demand for arbitration shall be filed in writing with the other party to the Owner-Contractor Agreement and with the American Arbitration Association, and a copy shall be filed with the Architect. The demand for arbitration shall be made within the time limits specified in Subparagraph 2.2.12 where applicable, and in all other cases within a reasonable time after the claim, dispute or other matter in question has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings

based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

7.9.3 Unless otherwise agreed in writing, the Contractor shall carry on the Work and maintain its progress during any arbitration proceedings, and the Owner shall continue to make payments to the Contractor in accordance with the Contract Documents.

\* \* \*

#### ARTICLE 10

#### PROTECTION OF PERSONS AND PROPERTY

\* \* \*

10.2.2 The Contractor shall give all notices and comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority bearing on the safety of persons or property or their protection from damage, injury or loss.

SUPPLEMENTARY GENERAL CONDITIONS

\* \* \*

Delete Paragraph 7.9.1. and substitute:

7.9 Arbitration

7.9.1 All claims, disputes and other matters in question between the parties to this contract, arising out of or relating to this contract or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing unless the parties mutually agreed [sic] otherwise. In any other arbitration, commenced or demanded pursuant to this Contract, then either party hereto, upon the written request of the other party, shall join in such other arbitrations and agree to the consolidation of the arbitrations. This agreement to arbitrate and to join and consolidate arbitrations shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in any court having jurisdiction thereof.



VOLT'S PETITION TO COMPEL  
ARBITRATION

---

PETTIT & MARTIN  
ROBERT B. THUM  
DEANNE M. TULLY  
101 California Street,  
San Francisco, CA 94111  
Telephone: (415) 434-4000

Attorneys for Defendant  
VOLT INFORMATION SCIENCES, INC.

(ENDORSED)  
F I L E D  
OCT 7, 1986  
GRACE K. YAMAKAWA  
County Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SANTA CLARA

THE BOARD OF TRUSTEES	)	
OF THE LELAND STANFORD	)	
JUNIOR UNIVERSITY, a	)	No. P 48603
body having corporate	)	
powers,	)	PETITION TO COMPEL
	)	ARBITRATION AND STAY
Plaintiff,	)	<u>ACTION</u>
	)	
v.	)	
	)	
VOLT INFORMATION	)	
SCIENCES, INC., TELE-	)	
COMMUNICATIONS INTER-	)	
NATIONAL, INC., BRIAN-	)	
KANGAS-FOULK & ASSO-	)	
CIATES, and DOES I	)	
through XX, inclusive,	)	
	)	
Defendants.	)	
	)	

Defendant Volt Information Sciences,  
Inc., alleges as follows:

1. Venue for this petition lies within the California Superior Court for the County of Santa Clara pursuant to California Code of Civil Procedure Section 1292.4.

2. On or about July 10, 1984, Volt Information Sciences, Inc. ("Volt") and Plaintiff The Board of Trustees of the Leland Stanford Junior University ("Stanford") entered into a written contract whereby Volt was to construct a Distribution Conduit System on the Stanford campus. This contract was the initial phase of an overall program to upgrade major components of campus electronic media facilities. The distribution conduit system would facilitate an overall integration of Stanford's many computer systems.

3. During the project numerous acts and omissions on the part of Stanford delayed and disrupted Volt's performance and significantly increased the cost of and time required for completion of Volt's work. Accordingly, on or about April 14, 1986, Volt submitted to Stanford a claim for additional compensation in the

amount of \$3,916,190 plus interest. On or about August 27, 1986, this claim was denied in full.

4. Paragraph 7.9.1 of the general conditions, a part of the contract, provides for the arbitration of all claims arising out of or relating to the contract of the breach thereof.

5. On or about August 27, 1986, Volt filed a demand for arbitration with the American Arbitration Association ("AAA") and demanded that Stanford submit such controversy to arbitration as agreed. Due to the magnitude and complexity of this particular dispute, the Regional Director of the AAA provided Volt and Stanford with a "blue ribbon" list of potential arbitrators including attorneys, engineers and architects recognized as experts in construction. Selection of the arbitration panel was underway when Stanford served Volt with its complaint in this action.

6. On or about September 4, 1986, Stanford filed a complaint in this court against Volt, Telecommunications International, Inc. ("TII") and Brian, Kangas, Foulk and Associates

("BK&F"). TII was Stanford's engineering consultant on the project and prepared the drawings and specifications for the conduit distribution system. TII contracted with BK&F as a subconsultant for the preparation of the drawings and specifications. Neither such defendant is a party to the arbitration agreement.

7. Stanford and Volt agree that the entire dispute between them, including the breach of contract and tort claims in Stanford's lawsuit and Volt's claims currently pending before the AAA, is properly subject to arbitration. Nonetheless Stanford refuses to submit to arbitration on the sole ground that the presence of additional defendants who are not parties to the arbitration agreement requires all parties to litigate their claims pursuant to Section 1281.2(c) of the California Code of Civil Procedure.

8. This petition is filed on the grounds that under both the Federal Arbitration Act, 9 U.S.C. Section 1, et seq., and the California



Arbitration Act, Code of Civil Procedure Section 1280, et seq., the Court must compel Stanford to arbitrate its claims against Volt. Stanford has filed its lawsuit against TII and BK&F solely to invoke the provisions of Section 1281.2(c). Stanford's claims against the third party defendants for indemnity are not yet ripe. Stanford has used the artifice of this lawsuit in an attempt to defeat a valid arbitration provision with Volt.

WHEREFORE, Volt prays:

1. That the Court order Stanford to arbitrate all controversies as herein alleged;
2. That the Court order the above-entitled action be stayed in its entirety until the petition to compel is determined and arbitration is concluded if ordered therein;
3. For costs of suit herein incurred; and

4. For such other and further relief as  
the Court may deem proper.

DATED: October 6, 1986.

PETTIT & MARTIN

By /s/ Robert B. Thum  
Robert B. Thum  
Attorneys for Defendant  
VOLT INFORMATION SCIENCES,  
INC.

VOLT'S DEMAND FOR ARBITRATION

(filed in Superior Court as  
exhibit to Volt's petition  
to compel arbitration)

---

American Arbitration Association  
CONSTRUCTION INDUSTRY ARBITRATION RULES  
Demand for Arbitration

Date: August 27, 1986

To (Name): Board of Trustees of Leland  
Stanford Junior University  
(Address) The Old Pavillion  
(City and State) Stanford, California 94305  
(Telephone) (415) 723-9611  
Attn: Facilities Project Management

Named claimant, a party to the arbitration agreement contained in a written contract, dated July 10, 1984 providing for arbitration under the Construction Industry Arbitration Rules, hereby demands arbitration thereunder.

(attach arbitration clause or quote hereunder)

see Exhibit A

NATURE OF DISPUTE

see Exhibit B

CLAIM OR RELIEF SOUGHT: (amount, if any)

Monetary damages in the amount of at least \$3,916,190, together with interest at the maximum rate permitted by law.

A three-arbitrator panel is requested.  
Please indicate industry category for each party.  
Claimant:

☐ Owner ☐ Architect ☐ Engineer ☒ Contractor  
☐ Subcontractor, Specify ☐ Other ☐

Respondent:

☒ Owner ☐ Architect ☐ Engineer ☐ Contractor  
☐ Subcontractor, Specify ☐ Other ☐

Hearing Locale Requested San Francisco, CA  
City and State

You are hereby notified that copies of our Arbitration Agreement and of this Demand are being filed with the American Arbitration Association at its San Francisco Regional Office with the request that it commence the administration of the arbitration. Under Section 7 of the Arbitration Rules, you may file an answering statement within seven days after notice from the Administrator.

Signed /s/ Robert B. Thum Title Attorney

Name of Claimant	<u>Volt Information Sciences, Inc.</u>
Address	<u>101 Park Avenue</u>
City and State	<u>New York, N.Y.</u> Zip Code <u>10178</u>
Telephone	<u>(212) 309-0200</u>
Name of Attorney	<u>Pettit &amp; Martin, Attn.</u> <u>Robert B. Thum</u>
Address	<u>101 California Street, 35th Floor</u>
City and State	<u>San Francisco, CA 94111</u>
Telephone	<u>(415) 434-4000</u>

Exhibit A

Paragraph 7.9.1, General Conditions:

All claims, disputes and other matters in question between the parties to this contract, arising out of or relating to this contract or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing unless the parties mutually agreed otherwise. In any other arbitration, commenced or demanded pursuant to this Contract, then either party hereto, upon the written request of the other party, shall join in such other arbitrations and agree to the consolidation of the arbitrations.



This agreement to arbitrate and to join and consolidate arbitrations shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in any court having jurisdiction thereof.

Exhibit B

Breach of Contract FC 3842, dated July 10, 1984, by and between Volt Information Sciences, Inc. ("Volt") and the Board of Trustees of Leland Stanford Junior University ("Stanford"), providing for the construction of the Distribution Conduit System, Project 2240. Under the Contract, Volt was to supply labor, materials, and equipment to construct the work shown on Stanford's plans and specifications, including site preparation, 24,000 linear feet of trench, 162,000 duct feet of PVC conduit, 25 manholes, 15 service boxes, building entry boxes, and surface restoration. Volt had no design or engineering responsibilities under the Contract.

During the project, numerous acts and omissions on the part of Stanford and its representatives delayed, disrupted and interfered with Volt's performance and significantly increased the cost of and time required for completion of its work. Those acts are the subject of this demand for arbitration, and include without limitation:

- The furnishing of a design (including field directions) so defective and unsuitable that (a) a large portion of the duct banks failed and had to be repaired or replaced; (b) virtually all of the prescribed running lines had to be re-engineered in the field; and (c) a significant number of changes were issued to Volt correcting design errors, adding substantial amounts of new work, and deleting/modifying old work.

- Pervasive interferences and delays to field performance, including the usurpation of Volt's right to control the specific manner and disposition of its forces and the precise sequence of its construction activities; the unilateral direction to increase man-loading and equipment-loading; constructive and express orders to accelerate; and the abandonment of contractually-prescribed chains of authority and lines of communication.

- Improper contract administration, including refusals to grant appropriate time extension requests; refusals to grant appropriate change order requests; the abridgment of Volt's right to plan and control the conduct of its work; the wrongful termination of Volt on account of fundamental design defects and errors for which Stanford was itself responsible; the imposition of unreasonable and punitive performance and other requirements as a part of rescinding the wrongful termination; and the unexcused failure, for over one year, to pay progress, change order, and retention billings plainly due under the Contract.

The project Stanford required Volt to perform was not the same project set forth in the bidding documents or plans and specifications. The entire character of the work was altered. Stanford abandoned the original project and instead imposed on Volt performance requirements that neither Volt nor any other reasonable contractor could have anticipated. Stanford abrogated its contractual responsibilities and materially breached the Contract.

AFFIDAVIT OF EUGENE CURRAN

(filed in Superior Court  
as attachment to Volt's  
Petition to Compel Arbitration)

---

PETTIT & MARTIN  
ROBERT B. THUM  
DEANNE M. TULLY  
101 California Street,  
San Francisco, CA 94111  
Telephone: (415) 434-4000

(ENDORSED)  
F I L E D  
OCT 7, 1986  
GRACE YAMAKAWA  
COUNTY CLERK

Attorneys for Defendant  
VOLT INFORMATION SCIENCES, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SANTA CLARA

THE BOARD OF TRUSTEES	)	
OF THE LELAND STANFORD	)	
JUNIOR UNIVERSITY, a	)	No. P 48603
body having corporate	)	
powers,	)	AFFIDAVIT OF EUGENE
	)	CURRAN IN SUPPORT OF
Plaintiff,	)	VOLT INFORMATION
	)	SCIENCES, INC.'S
v.	)	PETITION TO COMPEL
	)	ARBITRATION AND STAY
VOLT INFORMATION	)	LEGAL ACTION
SCIENCES, INC., TELE-	)	
COMMUNICATIONS INTER-	)	Date: November 4, 1986
NATIONAL, INC., BRIAN-	)	Time: 9:30 a.m.
KANGAS-FOULK & ASSO-	)	Dept. 2
CIATES, and DOES I	)	Judge Gordon
through XX, inclusive,	)	
	)	
Defendants.	)	
	)	

STATE OF NEW YORK     )  
                              )     SS.  
COUNTY OF NEW YORK    )

Eugene F. Curran , being duly sworn,  
deposes and says:

I am assistant Vice President and  
Comptroller for the Voltelcon Division of Volt  
Information Sciences, Inc. ("Volt"). I  
participated in the management of the  
Distribution Conduit System construction project  
("Project") in Stanford, California. I have  
personal knowledge of the following information:

1. Volt is a New York corporation and  
maintains its principal place of business in New  
York, New York;

2. The Project Manager and senior field  
personnel on the Project were transferred from  
Tennessee, Georgia, Florida, Colorado and New  
York to the jobsite in California;

3. In order to meet contractual  
obligations a significant portion of the work  
crews on the Project were transferred from  
Colorado and Florida to the jobsite in California;



4. In order to perform work on the Project, Volt procured goods and materials such as conduits and spacers from states other than California and transported those goods and material to California for use on the Project;

5. In order to perform work on the Project, Volt transferred equipment such as backhoes, trenchers, compressors and trucks from Tennessee, Colorado and Florida;

6. Administration and management of the Project including the payroll for the Project was conducted in Tennessee;

7. Volt's overall accounting records for the Project were maintained in Garden City, New York; and

8. Volt's corporate general management was also conducted in New York, New York.

I have read the foregoing affidavit and know it to be true of my own knowledge, except the matters that are stated in it on my information and belief and, as to those matters, I believe them to be true.

I declare under penalty of perjury that  
the foregoing is true and correct.

Executed this 2nd Day of October, 1986,  
at New York, New York.

/s/ Eugene F. Curran  
Eugene F. Curran

Subscribed and sworn to before me, a  
Notary Public in and for the State of  
New York.

/s/ John H. Pavlika

John H. Pavlika  
Notary Public State of  
New York  
No. 41-8300105 -  
Queens County

My commission expires: 12/31/88

ORDER OF THE SUPERIOR  
COURT DENYING APPELLANT'S  
PETITION TO COMPEL ARBITRATION

---

Filed  
Nov. 21, 1986  
Grace Yamakawa  
County Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA

BOARD OF TRUSTEES OF THE LELAND )	
STANFORD JUNIOR UNIVERSITY, a )	
body having corporate powers, )	No. P48603
)	
Plaintiff, )	
)	ORDER
v. )	
)	
VOLT INFORMATION SCIENCES, )	
INC., TELECOMMUNICATIONS )	
INTERNATIONAL, INC., BRIAN- )	
KANGAS-FOULK & ASSOCIATES, and )	
DOES I THROUGH XX, inclusive, )	
)	
Defendants. )	
_____ )	

Plaintiff's motion to stay arbitration is granted and defendant's motion to compel arbitration is denied. The court believes that the principals [sic] enunciated in Garden Grove Community Church vs. Pittsburgh-Des Moines Steel Co., 140 Cal.App.3d 251 and Prestressed Concrete, Inc. v. Adolphson & Peterson, Inc., 240 N.W.2d 551, as well as California Code of Civil Procedure §1281.2(c) apply in this case.

DATED: November 21, 1986

/s/ Charles Gordon  
CHARLES GORDON  
Judge of the Superior Court



OPINION OF THE CALIFORNIA  
COURT OF APPEAL FOR  
THE SIXTH APPELLATE DISTRICT

---

CERTIFIED FOR PUBLICATION

SEE DISSENTING OPINION

FILED  
October 5, 1987  
Richard J. Eyman,  
Clerk

IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

BOARD OF TRUSTEES	)	
OF LELAND STANFORD	)	
JUNIOR UNIVERSITY,	)	
Plaintiff-Respondent,	)	No. H002634
	)	
vs.	)	(Santa Clara
	)	County Super.
VOLT INFORMATION	)	Court P48603)
SCIENCES, INC.,	)	
Defendant-Appellant.	)	
	)	

The Board of Trustees of the Leland Stanford Junior University (Stanford) and Volt Information Sciences, Inc. (Volt) are parties to a written contract under which Volt was to construct a system of electrical conduits throughout the Stanford campus. The contract contains an agreement to arbitrate any disputes arising therefrom. It also contains this language: "The contract shall be governed by the law of the

place where the project is located."

A dispute developed regarding compensation for additional work. Volt submitted a claim which Stanford refused to pay; whereupon Volt served on Stanford a formal demand for arbitration of its claim. Approximately a week later Stanford filed suit in Superior Court. The complaint alleged fraud and breach of contract, inter alia, against Volt and in addition sought indemnity from two companies involved in the design and management of the project. Stanford did not have arbitration agreements with these two firms.

Volt then filed a petition to compel arbitration and to stay prosecution of the lawsuit. Stanford responded with a motion to stay the arbitration pursuant to the terms of Code of Civil Procedure section 1281.2, subdivision (c), 1/ on the ground that a lawsuit

---

1/ "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it (contd.)

was pending involving defendants not bound by the arbitration agreement. The court denied Volt's petition and granted Stanford's motion under authority of section 1281.2. Volt appeals from that ruling.

The parties agree that their contract involves interstate commerce, and that, generally, the Federal Arbitration Act (the FAA) governs contracts in interstate commerce. There is no provision in the FAA corresponding to Code of Civil Procedure section 1281.2, subdivision (c) which would allow a court to stay arbitration when third parties not subject to arbitration are

---

(footnote contd.) determines that an agreement to arbitrate the controversy exists, unless it determines that: ... [ ] (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common question of law or fact. ... [ ] If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court ... (4) may stay arbitration pending the outcome of the court action or special proceeding."

involved in the dispute; thus it is apparent that were the federal rules to apply, Volt's petition to compel arbitration would have to be granted. On the other hand, Stanford and Volt have agreed, as we interpret their choice of law provision, that the laws of California, of which section 1281.2 is certainly a part, are to govern their contract. It is Stanford's position that enforcement of the arbitration agreement in accordance with the chosen California rules of procedure does not create a conflict with the federal act, since the purpose of the Act was to ensure that private agreements to arbitrate are enforceable contracts. Moreover, application of the federal rules in this case would force the parties to arbitrate in a manner contrary to their agreement. On balance it is this last point we find persuasive. Accordingly we will affirm the trial court's ruling.

I.

We start with the well-established principle that the interpretation of a written agreement



is a legal question unless the interpretation turns upon the credibility of extrinsic evidence. (Estate of Dodge (1971) 6 Cal.3d 311, 318.) There was no extrinsic evidence here and thus no issue of fact. Consequently we are not bound by the trial court's construction but must reach our own determination of the meaning of this provision. (Rooney v. Vermont Investment Corp. (1973) 10 Cal.3d 351, 372.) In this case we agree with the trial judge that by choosing "the law of the place where the project is located," the parties chose to be governed by California law.

The quoted words are a standard choice of law provision contained in an American Institute of Architects document entitled "General Conditions of the Contract for Construction," 2/ intended for use by contracting parties across the nation. It is therefore not remarkable that the particular site of the project in question is not named. We have no doubt that the word "place" was intended to mean the forum state.

---

2/ AIA Document A201, § 7.1.1.

Courts in other states faced with this identical language have reached the same conclusion we do here. (Lane-Tahoe, Inc. v. Kindred Construction Company (Nev. 1975) 536 P.2d 491, 493; Eric A. Calstrom Construction v. Independent Sch. Dist. (Minn. 1977) 256 N.W.2d 479, 483; Standard Co., etc. v. Elliott Const. Co., Inc. (La. 1978) 363 So.2d 671.) Likewise, in the California case of Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co. (1983) 140 Cal.App.3d 251, handed down the year before the Stanford-Volt agreement was forged, parties to a construction contract agreed to be governed by the law of the construction site, which the court took to mean California.

We do not find reasonable Volt's interpretation that the "place" where the project is located be construed to mean not only the state of California but also the nation of the United States of America. The question whether the Federal Arbitration Act nonetheless applies by virtue of the fact that the contract is one in interstate commerce is another matter,

to which we turn next.

## II.

Volt argues even if the choice of law provision is taken to mean that California law shall govern, the supremacy clause of the United States Constitution operates to preempt California law because the contract is in interstate commerce . The parties' choice of law insofar as it results in direct conflict with federal law under the provisions of the FAA would thus be rendered void and the federal rule would prevail.

We cannot countenance such a result. At the outset, it is by no means entirely clear that the parties cannot choose to arbitrate under the state rather than the federal statutory scheme. The court in Garden Grove considered this question. "The Federal Arbitration Act by its terms applies to all commercial agreements involving interstate commerce; thus, on the face of it, it would appear federal law controls. However, in this case the parties agreed by contract to be governed by the law of the

construction site, California. While California courts have held the Federal Arbitration Act (FAA) applies to California cases involving contracts of interstate commerce, we have not found any cases applying it where the parties committed to be governed by state law. In the face of such a choice of laws provision, California law applies unless preempted by the FAA." (Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co., supra, 140 Cal.App.3d at p. 262.)

State law is preempted only to the extent that it stands as an obstacle to the accomplishment of the aims of the federal enactment. (Perez v. Campbell (1971) 402 U.S. 637, 644; Waysl, Inc. v. First Boston Corp. (9th Cir. 1987) 813 F.2d 1579.) The FAA was intended to "revers[e] centuries of judicial hostility to arbitration agreements." (Scherk v. Alberto-Culver Co. (1974) 417 U.S. 506, 510 [94 S.Ct. 2449, 2453].) The purpose behind its passage was "to ensure judicial enforcement of privately made agreements to arbitrate. ... The

Act ... does not mandate the arbitration of all claims, but merely the enforcement - upon the motion of one of the parties - of privately made arbitration agreements. ... [I]ts purpose was to place an arbitration agreement 'upon the same footing as other contracts, where it belongs,' ..." (Dean Witter Reynolds, Inc. v. Byrd (1985) 470 U.S. 213, 219 [105 S.Ct. 1238, 1242].)

Bearing this in mind there is little doubt that the FAA preempts state common law under which arbitration agreements are unenforceable. (See, e.g., Episcopal Housing Corp. v. Federal Ins. Co., (S.C. 1977) 239 S.E.2d 647.) It is equally apparent that state statutes which bar the enforcement of arbitration agreements in particular areas of the law must give way to the federal policy. Thus in two recent United States Supreme Court cases 3/ California's Franchise Investment Law (Corp. Code, § 31512),

---

3/ Southland Corp. v. Keating 465 U.S. 1 (1984) and Perry v. Thomas (1987) 482 U.S. \_\_\_, [96 L.Ed.2d 426].



and Labor Code section 229, respectively, both of which allow for a judicial forum notwithstanding a valid arbitration agreement, were held to be preempted by the FAA.

It does not follow, however, that the federal law has preclusive effect in a case where the parties have chosen in their agreement to abide by state rules. In fact it would appear that the federal law mandates enforcement of such an agreement according to its terms, since the recognized aim of the Act was to make arbitration agreements "as enforceable as other contracts." (Prima Paint v. Flood & Conklin (1967) 388 U.S. 395, 404, fn. 12.)

The thrust of the federal law is that arbitration is strictly a matter of contract. In this California law is entirely in accord: "Arbitration is ... a matter of contract, and the parties may freely delineate the area of its application." (O'Malley v. Wilshire Oil Co. (1963) 59 Cal.2d 482, 490.) Since "[t]he 'Act does not dictate that we should disregard parties' contractual agreements ... outlining

the boundaries of the areas intended to be arbitrable"" (Chan v. Drexel Burnham Lambert, Inc. (1986) 178 Cal.App.3d 632, 640), it follows that the parties are at liberty to choose the terms under which they will arbitrate, and such a choice will not run afoul of the FAA. Stated another way, the Act does not operate to require the parties to submit to arbitration any dispute which they have not agreed so to submit. (AT&T Tech., Inc. v. Communications Workers (1986) \_\_\_ U.S. \_\_\_, [106 S.Ct. 1415, 1418].)

If the parties here had expressly stated in their agreement that they wished to arbitrate only those disputes between themselves which did not involve third parties not bound by the arbitration agreement, this provision would presumably be enforceable. In our view they accomplished the same thing by choosing to be governed by California law, thus incorporating the California rules of civil procedure governing arbitration agreements.

Were the federal rules to be imposed in this case to override the parties' choice of

law, the effect would be to force the parties to arbitrate where they agreed not to arbitrate. This result is not only inimical to the policies underlying state and federal arbitration law as expressed above, it also violates basic principles of contract law. Since contractual terms are rarely agreed to without reason, it is assumed that no part of an agreement is superfluous or without effect, but that each term was bargained for. (Rest. Contracts 2d. § 203.) Where a party is deprived of a benefit of his bargain by the operation of law, that party is excused from his duty to perform. (Rest. Contracts §§ 458, 463, 464; 6 Corbin, Contracts (1962) Discharge by Failure of Consideration Either Existing or Prospective, § 1255; 1 Witkin, Summary of Cal. Law (8th ed.) Contracts, Frustration of Purpose § 612, Operation of Law § 607.) Thus even if we were to decide, which we do not, that federal law preempted here, Stanford would be entitled to raise this defense to further performance under the arbitration agreement.

### III.

Shortly before oral argument in this matter the case of Liddington v. The Energy Group, Inc. (1987) 192 Cal.App.3d 1520 was decided by the First District. That case involved a service contract in interstate commerce containing both an arbitration agreement and also a choice of law provision designating California to be the forum state. The contract further provided that the parties "'shall be deemed to have agreed to binding arbitration in the State of California ...'" (Id., at p. 1523, fn. 3.) When the Liddingtons were sued by a bank for default on a promissory note, they cross-complained against The Energy Group, assignee of the service contract, for failure to install energy systems financed by the bank. The Energy Group then filed a petition to compel arbitration pursuant to the arbitration clause. The trial court stayed arbitration pending the resolution of the litigation, on the basis of Code of Civil Procedure section 1281.2, subdivision (c). On appeal The Energy Group argued that Code of

Civil Procedure section 1281.2 was preempted to the extent it was used to stay arbitration proceedings governed by the FAA. The Court of Appeal agreed and reversed.

Despite the striking similarity between this case and ours, we conclude that the precise question before us was not decided in Liddington. The analysis in Liddington approached the preemption issue from the standpoint of whether the state law in question was a general principle applicable to all contracts, or a rule pertaining exclusively to arbitration contracts. If it was the latter, it would be preempted by the rules contained in the FAA to the extent that they conflicted. In reaching its decision that section 1281.2 fell into this category, the Liddington court relied upon a footnote in the United States Supreme Court case of Perry v. Thomas, supra, 482 U.S. \_\_\_\_ [96 L.Ed.2d 426, 437] decided only two weeks earlier. In footnote nine in that case the court said this: "Thus state law, whether of legislative or judicial origin, is



applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement ...."

In Perry the court was faced on the one hand with a private agreement to arbitrate according to state law, and on the other with a state law expressly providing for a judicial forum in spite of the arbitration agreement. State policy was therefore directly at loggerheads with the purposes behind the FAA, and the federal law prevailed to enforce the private agreement. In our case the issue is not whether the state law is one directly affecting the enforceability of arbitration agreements, but rather whether the federal rules can be applied to compel parties to arbitrate contrary to the choice of law in their agreement. Neither Perry nor Liddington addresses this question.

Nor do we find the cases of Moses H. Cone Hospital v. Mercury Constr. Corp. (1983) 460 U.S. 1 [103 S.Ct. 927] or Dean Witter Reynolds, Inc. v. Byrd (1985) 470 U.S. 213 [105 S.Ct. 1238], relied upon by Volt, to be on point here. Both of these cases arose in the context of competing claims in federal and state courts. Neither concerned the enforceability of a contractual choice of law provision.

#### IV.

As an additional ground for appeal Volt contends that even if California law were to apply, section 1281.2, subdivision (c) cannot be construed to authorize a stay under the circumstances presented here. Volt argues that application of the statute where Stanford has brought the separate action as a "reactive" response to the demand for arbitration, would amount to giving license to a party to avoid its obligations under an arbitration agreement by simply filing a lawsuit against the party seeking arbitration and joining others not part of the agreement.

As Volt concedes, the language of section 1281.2 is sufficiently broad to encompass the present procedural posture. Moreover the statute does not provide for a stay in every case in which the moving party has filed a separate lawsuit, but rather gives the court discretion to make such a ruling in an appropriate case.

It is well known that a court of review will not reverse a discretionary ruling in the absence of a clear abuse of discretion.

(Barajas v. USA Petroleum Corp. (1986) 184 Cal.App.3d 974, 989.)

The guidelines for the exercise of discretion here are set forth in the statute itself. The court may grant the stay if it determines that there is a pending court action involving a third party "arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings of law or fact."

Volt claims there is no evidence establishing common issues of law or fact since

its demand for arbitration concerned a claim for payment of additional compensation against Stanford alone. In the body of the demand, however, Volt has stated that the changes and additional work it was required to perform were due to a "defective and unsuitable" design and "improper contract administration." Volt does not dispute that the two companies named by Stanford in its complaint were instrumental in the design and management of the project.

Stanford has not merely asserted ancillary claims against unnamed Does in its lawsuit, as was the case in Bos Material Handling, Inc. v. Crown Controls Corp. (1982) 137 Cal.App.3d 99. In that case the court found that this was insufficient to show a third party claim which would create "a possibility of conflicting rulings on a common issue of law or fact." (Code Civ. Proc., § 1281.2, subd. (c).) Rather Stanford has named two parties both closely involved in the management and design of the project, who conceivably could play a role in the present dispute. The possibility of

conflicting rulings is readily apparent. Under the circumstances we need go no further than to say we find no abuse of discretion.

The order of the trial court is affirmed.

---

Brauer, J.

I concur:

---

Agliano, P.J.



CAPACCIOLI, J., dissenting:

I respectfully dissent. I find that the majority's analysis is flawed because it is based upon an erroneous premise, namely that the parties chose California arbitration law over federal law by agreeing that the contract would be "... governed by the law of the place where the project is located."

Analytically, it makes no difference in this case whether California and the United States or California alone is the "place." There can be no conflict between federal and state law because a state law is void to the extent it conflicts with federal law under the Supremacy Clause of the United States Constitution and all the states in our republic are bound by the same federal law. (U.S. Const., art. 6, cl. 2; Maryland v. Louisiana (1981) 451 U.S. 725, 746-47 [68 L.Ed.2d 576, 595-96]; Perez v. Campbell (1971) 402 U.S. 637, 649 [29 L.Ed.2d 233, 242].) The Supremacy Clause of the United States Constitution provides: "The Constitution,

and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., art. 6, cl. 2.)

California's Constitution as well as the U.S. Constitution establishes that federal law is paramount: "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land." (Cal. Const., art. 3, § 1.) Furthermore, the California Supreme Court has held that the California courts have a nondiscretionary duty to enforce federal law where they have concurrent jurisdiction. (Gerry of California v. Superior Court (1948) 32 Cal.2d 119, 122; Brown v. Pitchess (1975) 13 Cal.3d 518, 523.) Thus, under California law, federal law governs matters cognizable in California upon which the United States has definitively spoken.

Thus, the parties' choice of law provision, even assuming arguendo that it must be interpreted as an agreement to have California law govern, does not invariably lead to the conclusion that federal law is inapplicable. To the contrary, where federal law is supreme, California law mandates that federal law controls.

The Federal Arbitration Act requires state and federal courts to enforce any arbitration agreement contained in a contract "evidencing a transaction involving commerce" "... save upon such grounds as exist at law and equity for the revocation of any contract." (See 9 U.S.C., § 2; see Perry v. Thomas (1987) 482 U.S. \_\_\_\_ [96 L.Ed.2d 426, 435-37]; Dean Witter Reynolds, Inc. v. Byrd (1985) 470 U.S. 213, 215-17 [84 L.Ed.2d 158, 161-63, 165]; Southland Corp. v. Keating 1984) 465 U.S. 1, 10-16 [79 L.Ed.2d 1, 12-16].) To the extent California law permits a court to deny or stay arbitration in the face of an unqualified agreement to arbitrate, that law is preempted by the Federal Arbitration Act where a

contract "evidencing a transaction involving commerce" is concerned. (Liddington v. The Energy Group, Inc. (1987) 192 Cal.App.3d 1520, 1525-29; see Perez v. Campbell, supra, 402 U.S. at pp. 644, 649 [29 L.Ed.2d 233, 239, 244]; cf. Perry v. Thomas, supra; Southland Corp. v. Keating, supra.)

While I agree with the majority that the Federal Arbitration Act does not preclude parties from contractually limiting the scope of their arbitration agreement (see Seaboard Coast Line R. Co. v. Trailer Train Co. (1982) 690 F.2d 1343, 1348, 1352; Davis v. Chevy Chase Financial Ltd. (1981) 667 F.2d 160, 165; Alabama Ed. Ass'n. v. Alabama Prof. Staff Organ. (1981) 655 F.2d 607; Lounge-A-Round v. GCM Mills, Inc. (1980) 109 Cal.App.3d 190, 195; cf. United Steelworkers v. Warrior & Gulf Co. (1960) 363 U.S. 574 [4 L.Ed.2d 1409]), the mere choice of California law is not a selection of California law over federal law and does not in any way limit an otherwise unqualified agreement to arbitrate.

The majority concedes that Volt's petition to compel arbitration would have to be granted if the federal law applied. I think there is no doubt that it does.

I would reverse and remand.

---

Capaccioli, J.



ORDER OF THE CALIFORNIA  
SUPREME COURT DENYING  
VOLT'S PETITION FOR REVIEW

---

Filed  
Dec. 17, 1987  
Lawrence P. Gill,  
Clerk

ORDER DENYING REVIEW  
AFTER JUDGMENT BY THE COURT OF APPEAL  
6th District, No. H002634

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

IN BANK

---

BOARD OF TRUSTEES OF THE  
LELAND STANFORD JUNIOR UNIVERSITY, Respondent

v.

VOLT INFORM. SCIENCES, INC., Appellant

---

Appellant's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed October 5, 1987, which appears at 195 Cal.App.3d 349. (Cal. Const., Art. VI, sec. 14; Rule 976, Cal. Rules of Court.)

---

/s/ Malcolm Lucas  
Chief Justice

6

Supreme Court, U.S.  
**FILED**  
MAY 26 1988  
JOSEPH F. SPANIO, JR.  
CLERK

No. 87-1318

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

---

VOLT INFORMATION SCIENCES, INC.,  
Appellant,

vs.

BOARD OF TRUSTEES OF LELAND STANFORD  
JUNIOR UNIVERSITY, Appellee.

---

ON APPEAL FROM THE  
COURT OF APPEAL OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

---

APPELLANT'S OPENING BRIEF

JAMES E. HARRINGTON  
(Counsel of Record)  
ROBERT B. THUM  
DEANNE M. TULLY  
PETTIT & MARTIN  
101 CALIFORNIA STREET  
SAN FRANCISCO, CA 94111  
PHONE: (415) 434-4000

COUNSEL FOR APPELLANT

122

### QUESTIONS PRESENTED

1. Whether a California statute limiting the enforceability of arbitration agreements, which directly conflicts with the Federal Arbitration Act and would therefore ordinarily be preempted in any case involving a transaction covered by the Act, may nevertheless be applied in such a case to deny enforcement of an arbitration agreement, where the agreement appears in a construction contract that is to be performed in California and the contract contains a choice-of-law clause specifying that it "shall be governed by the law of the place where the project is located."

2. Whether a judgment of a state court denying enforcement of an arbitration agreement on the basis of an affirmative answer to the preceding question rests upon an "adequate and independent state ground" that precludes review of the judgment by this Court.

LIST OF AFFILIATED COMPANIES  
(Rule 28.1)

Appellant Volt Information Sciences, Inc., is a publicly owned corporation, incorporated in the State of New York. Its subsidiaries (other than wholly owned subsidiaries and wholly owned subsidiaries of wholly owned subsidiaries) are the following: Autologic, Inc., a California corporation; Long Beach Blueprint Company, a California corporation; DataNational Corporation, a Pennsylvania corporation; and Courtnay's Pty., Ltd., an Australian corporation. Appellant is also a 50 per cent participant in the following joint ventures: UV Associates, a Missouri joint venture; Australian Directory Services, an Australian joint venture; VNM Directory Support Services, a Nevada joint venture; Pacific Volt Information Systems, a California joint venture; and UVA Company, a Georgia joint venture.



## TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	6
STATEMENT OF THE CASE	7
SUMMARY OF ARGUMENT	16
1. Jurisdiction	16
2. Basic Rules Governing Application of the Arbitration Act to This Case	20
3. Interpretation of the Choice-of-Law Clause	20
4. Invalidity of the Choice-of-Law Clause as Interpreted by the Court of Appeal	23
ARGUMENT	25
I. The Court of Appeal's Judgment Does Not Rest Upon an "Adequate and Independent State Ground" That Would Preclude Review of the Judgment by This Court.	25
A. All of The Issues Presented by This Appeal Are Exclusively Issues of Federal Law.	26
1. The So-Called "Choice-of-Law Issue Is Really an Issue of Federal Supremacy.	26
2. The Issue of Contract Interpretation Likewise Presents a Federal Question, Because (a) It Involves a Purported Waiver of Federal Rights, and (b) the Only	29

Principle of Contract Interpretation on Which It Turns Is a Principle Whose Sole Function Is To Determine the Applicability of Federal Law.

3. This Court Has Previously Assumed, by Accepting Jurisdiction to Decide This Same Issue in the de la Cuesta Case, That the Issue Presented by This Appeal Is a Federal Question Appropriate for Decision by This Court. 43
- B. In Any Event, Even if the Court of Appeal's Ruling on the Interpretation Issue Could Properly Be Viewed as Resting Upon Principles of State Law, That Ruling Would Not Present an "Adequate and Independent State Ground" for the Court's Judgment. 45
  1. The Court of Appeal's Decision on This Issue Is Logically Dependent upon and "Interwoven" with the Resolution of at Least Two Issues of Federal Law. 46
  2. The Court of Appeal's Interpretation of the Choice-of-Law Clause Is Not "Broad Enough to Sustain the Judgment," Because Even the Acceptance of That Interpretation Would Still Leave the Judgment Subject to Reversal on a Separate Federal Ground. 53
  3. There Is No "Fair or Substantial Basis" for the Court of Appeal's Interpretation of the Choice-of-Law Clause. 55
- II. There Is No Serious Controversy That the Federal Arbitration Act Would Require Arbitration of the Parties' Present Dispute if the 59

Choice-of-Law Clause in the Contract Were Not Interpreted to Foreclose the Application of the Act to This Case.

- III. For No Less Than Six Independently Sufficient Reasons, The Choice-of-Clause Must Be Interpreted to Permit, Indeed to Require, Application of the Federal Arbitration Act to This Transaction. 66
  - A. To Interpret a Choice-of-Law Clause as Foreclosing the Application of Federal Law Is Discordant with the Common Understanding of the Function of Such Clauses. 66
  - B. The Literal Terms of the Parties' Contract Refute the Contention That It Was Intended to Preclude the Application of Federal Law to This Transaction. 74
  - C. As This Court Held with Regard to a Virtually Identical Provision in the de la Cuesta Case, the Basic Tenets of Federalism Likewise Dictate That the Term "Law of the Place Where the Project Is Located" Must Be Construed to Encompass Federal Law as Well as State Law. 77
  - D. The Only Evidence in the Record Regarding the Intent of the Parties Suggests That the Federal Arbitration Act Was Intended to Govern the Resolution of Disputes Arising Under the Contract. 81
  - E. The Overwhelming Weight of Authority, Both in This Court and in the Lower Courts, Supports the Conclusion That a Choice-of-Law Provision of the Kind at Issue Here Does Not Affect the Application of Federal Law to the Parties' Transaction. 85

F. At All Events, Any Ambiguity That Might Exist in the Terms of the Choice-of-Law Clause Would Have to Be Resolved in Favor of the Application of Federal Law, Pursuant to the Settled Federal Rule That Arbitration Agreements Must Be "Generously Construed" to Promote "the Federal Policy Favoring Arbitration."	92
IV. Even if the Court of Appeal's Interpretation of the Choice-of-Law Clause Were to Be Accepted, the Application of Federal Law to This Transaction Would Still Be Required, Because That Interpretation Would Render the Clause Unenforceable as a Violation of Federal Public Policy.	96
A. The Principle Is Well Established in All Courts, Including This One, That a Choice-of-Law Clause Will Not Be Enforced Where This Would Lead to a Violation of a Fundamental Public Policy of the Jurisdiction Whose Law Would Otherwise Apply to the Transaction.	96
B. Application of This Settled Rule to the Court of Appeal's Interpretation of the Choice-of-Law Clause at Issue Here Would Require That the Clause, as So Interpreted, Be Held Invalid on the Ground That Its Enforcement Would Contravene the Fundamental Federal Policy Favoring Arbitration of Private Disputes.	101
CONCLUSION	105

# TABLE OF AUTHORITIES

## Cases

Abie State Bank v. Bryan, 282 U.S. 765 (1931)	38,47, 53,54
Acevedo Maldonado v. PPG Indus- ries, Inc., 514 F.2d 614 (1st Cir. 1975)	62
ADC Constr. Co. v. McDaniel Grad- ing Co., 338 S.E.2d 733 (Ga.App. 1986)	35,69,88
Ake v. Oklahoma, 470 U.S. 68 (1985)	35,47
American Ry. Exp. Co. v. Levee, 263 U.S. 19 (1923)	4
Ancient Egyptian Order v. Michaux, 279 U.S. 737 (1929)	56
Aro Mfg. Co. v. Convertible Top Co., 377 U.S. 476 (1964)	31
Atlantic Painting & Contracting, Inc. v. Nashville Bridge Co., 670 S.W.2d 841 (Ky. 1984)	69,88
Barnes Group, Inc. v. C & C Products, Inc., 716 F.2d 1023 (4th Cir. 1983)	98
Bense v. Interstate Battery System, Inc., 683 F.2d 718 (2d Cir. 1982)	99
Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956)	69,71, 86,101
Broad River Power Co. v. South Carolina, 281 U.S. 537 (1930)	56
Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1944)	32



Burke County Public Schools v. The Shaver P'ship., 279 S.E.2d 816 (N.C. 1981)	87
Burks v. Lasker, 441 U.S. 471 (1979)	32,33
C. Itoh & Co. v. Jordan Intl. Co., 552 F.2d 1228 (7th Cir. 1977)	62
Claflin v. Houseman, 93 U.S. 130 (1876)	78
Collins Radio Co. v. Ex-Cell-O Corp., 467 F.2d 995 (8th Cir. 1972)	69,88
Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263 (7th Cir. 1976)	87,89,96, 99,104
Cone Mills Corp. v. August F. Nielsen Co., 455 N.Y.S.2d 625 (N.Y.Sup.Ct. 1982)	90,97,104
Davis v. Wechsler, 263 U.S. 22 (1923)	56
Day & Zimmerman, Inc. v. Chal- loner, 423 U.S. 3 (1975)	26,27
Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985)	62
Del E. Webb Const. Co. v. Rich- ardson Hosp. Auth., 823 F.2d 145 (5th Cir. 1987)	64,69,87
Demorest v. City Bank Farmers Trust Co., 321 U.S. 37 (1944)	35,56
Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359 (1952)	31
D'Oench, Dume & Co. v. FDIC, 315 U.S. 447 (1942)	33
E.C. Ernst, Inc. v. Manhattan Constr. Co., 551 F.2d 1026 (5th Cir. 1977)	35

Enterprise Irrig. Dist. v. Farmers Mutual Canal Co., 243 U.S. 157 (1917)	47,53
Episcopal Housing Corp. v. Federal Ins. Co., 239 S.E.2d 647 (S.C. 1977)	62,64,87
Eric A. Carlstrom Const. Co. v. Independent School Dist. No. 77, 256 N.W.2d 479 (Minn. 1977)	90
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)	40
Estate of Lindquist, 154 P.2d 879 (Cal. 1944)	93
FDIC v. Bank of America, 701 F.2d 831 (9th Cir. 1983), cert. den. 464 U.S. 935 (1983)	98
Fidelity Federal S. & L. Assn. v. de la Cuesta, 458 U.S. 141 (1982)	3,5,43-44, 72,77,80- 81,85,101
Ford v. Shearson Lehman Amer. Express Co., 225 Cal.Rptr. 895 (Cal.App. 1986)	69,88,92
Fox Film Corp. v. Muller, 296 U.S. 207 (1935)	38
Fox River Paper Co. v. Railroad Comm., 274 U.S. 651 (1927)	38
Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207 (5th Cir. 1981)	34
Gamewell Mfg. Co. v. HVAC Supply, Inc., 715 F.2d 112 (4th Cir. 1983)	34
Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., 191 Cal.Rptr. 15 (Cal.App. 1983)	38,84, 91,92

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942)	32
Gerry of California v. Superior Court, 194 P.2d 689 (Cal. 1948)	93
Hale v. Iowa State Board of Assess- ment, 302 U.S. 95 (1938)	56
Hall v. Superior Court, 197 Cal.Rptr. 757 (Cal.App. 1983)	98
Hamilton Life Ins. Co. v. Republic Natl. Life Ins. Co., 408 F.2d 606 (2d Cir. 1969)	62
Hart v. Orion Ins. Co., 453 F.2d 1358 (10th Cir. 1971)	35
Hauenstein v. Lynham, 100 U.S. 483 (1880)	78,80
Hilti, Inc. v. Oldach, 392 F.2d 368 (1st Cir. 1968)	35,69,88
Huber, Hunt & Nichols v. Archi- tectural Stone Co., 625 F.2d 22 (5th Cir. 1980)	78,87,90, 97,104
Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938)	56
In re Mercury Constr. Corp., 656 F.2d 933 (4th Cir. 1981), affd. sub nom. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	35,64
International Longshoremen's Assn. v. Davis, 476 U.S. 380 (1986)	3,37,47
Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968)	4
Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275 (1958)	47

James v. Kentucky, 466 U.S. 341 (1984)	56,57
Jones v. Taber, 648 F.2d 1201 (5th Cir. 1981)	34
Keystone Leasing Corp. v. People's Protective Life Ins. Co., 514 F. Supp. 841 (E.D.N.Y. 1981)	98
Klaxon v. Stentor Mfg. Co., 313 U.S. 487 (1941)	26,27
Kronovet v. Lipchin, 415 A.2d 1096 (Md. 1980)	98,99
LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334 (9th Cir. 1986)	69,88
Lane-Tahoe, Inc. v. Kindred Const. Co., 536 P.2d 491 (Nev. 1975)	90
Lawrence v. State Tax Comm., 286 U.S. 276 (1932)	56
Leet v. Union Pacific R.R. Co., 155 P.2d 42 (Cal. 1944)	93
Liddington v. The Energy Group, Inc., 238 Cal.Rptr. 202 (Cal. App. 1987)	62,70, 88,92
Liner v. Jafco, Inc., 375 U.S. 301 (1964)	32,41
Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634 (Tex.Civ.App. 1973)	35,87
Maxum Foundations, Inc. v. Salus Corp., 779 F.2d 974 (4th Cir. 1986)	35,36
McCarty v. McCarty, 453 U.S. 210 (1981)	3,5

Mesa Operating Ltd. P'ship. v. Intrastate Gas Comm., 797 F.2d 238 (5th Cir. 1986)	89,97,104
Michigan v. Long, 463 U.S. 1032 (1983)	40,47
Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157 (1954)	4
Miller v. Municipal Court, 142 P.2d 297 (Cal. 1943)	92
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1986)	31,50,52,71, 94,95,98,100, 102,103
Mondou v. New York, N.H. & Hart- ford R.R. Co. (Second Employers Liability Act Cases), 223 U.S. 1 (1912)	78
Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	50,51,52,60, 61,94,95,102
Murdock v. City of Memphis, 20 Wall. (87 U.S.) 590 (1875)	40,53,54
Ott v. Midland-Ross Corp., 523 F.2d 1367 (6th Cir. 1975)	34
Parker v. DeKalb Chrysler-Plymouth, Inc., 673 F.2d 1178 (11th Cir. 1982)	34
Pathman Const. Co. v. Knox Cty. Hosp. Assn., 326 N.E.2d 844 (Ind.App. 1975)	64
Paul Allison, Inc. v. Minikin Storage, Inc., 486 F.Supp. 1 (D.Neb. 1979)	89,96,104
Perry v. Thomas, U.S. —, 107 S.Ct. 2520 (1987)	3,5,51,60, 65,94,102



Pinkis v. Network Cinema Corp., 512 P.2d 751 (Wash.App. 1973)	69,89
Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156 (5th Cir. 1986)	35
Prima Paint Co. v. Flood & Conklin, 388 U.S. 395 (1967)	63
Redel's, Inc. v. General Elec. Co., 498 F.2d 95 (5th Cir. 1974)	34
RFC v. Beaver County, 328 U.S. 204 (1946)	33,40
R.J. Palmer Constr. Co. v. Wichita Band Instr. Co., 642 P.2d 127 (Kan.App. 1982)	62
Robertson v. Wegmann, 436 U.S. 584 (1978)	32,33
Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)	69,70,86, 100,101,103
Shearson Amer. Express, Inc. v. McMahon, 107 S.Ct. 2332 (1987)	102
Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942)	32
South Dakota v. Neville, 459 U.S. 533 (1983)	35
Southland Corp. v. Keating, 465 U.S. 1 (1984)	3,51,60, 64,94,102
Standard Co. of New Orleans v. Elliott Constr. Co., 363 So.2d 671 (La. 1978)	38,91
State ex rel. Geil v. Corcoran, 623 S.W.2d 557 (Mo.App. 1981)	98
State ex rel. St. Joseph Light & Power Co. v. Donelson, 631 S.W.2d 887 (Mo.App. 1982)	89,96,104

TAC Travel Amer. Corp. v. World Airways, Inc., 443 F.Supp. 825 (S.D.N.Y. 1978)	69,88
Temporarily Yours-Temporary Help Services, Inc. v. Manpower, Inc., 377 So.2d 825 (Fla.App. 1979)	98
Tennessee River Pulp & Paper Co. v. Eichleay Corp., 637 S.W.2d 853 (Tenn. 1982)	87
Testa v. Katt, 330 U.S. 386 (1947)	78
The Kensington, 183 U.S. 263 (1902)	97,99,103
Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885 (3d Cir. 1975)	34
United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979)	32,33,72,72,102
United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973)	33,41,42
United States v. Standard Oil Co., 332 U.S. 301 (1947)	33
Ward v. Love County, 253 U.S. 17 (1920)	41,53,56
Wasy1, Inc. v. First Boston Corp., 813 F.2d 1579 (9th Cir. 1987)	69
Xerox Corp. v. Harris County, 459 U.S. 145 (1982)	47,53
Zacchini v. Scripps-Howard Broadcasting Corp., 433 U.S. 562 (1977)	35
Zenith Radio Corp. v. Hazeltine Research Co., 401 U.S. 321 (1971)	31

Statutes, Rules, and  
Constitutional Provisions

U.S. Const., Art. VI, cl. 2	passim
9 U.S.C. §§1-4	passim
28 U.S.C. §1257(2)	1,2,3
28 U.S.C. §2101(c)	5
Rules of the U.S. Supreme Court, Rule 34.1(e)	6
Rules of the U.S. Supreme Court, Rule 16.8	6
Calif. Code of Civil Proc. §1281.2(c)	2,7,12,13, 14,15,61,62
Calif. Rules of Court, Rule 24(a)	5
Calif. Rules of Court, Rule 28(b)	5

Treatises and Restatements

Ehrenzweig, Conflict of Laws (1962)	67
Restatement, Conflict of Laws (2d) (1971)	67,98,99
Siegel, Conflicts (1982)	67
Weintraub, Commentary on the Conflict of Laws (3d ed. 1986)	99
Wright et al., Federal Practice & Procedure (1977)	3,39,56

Miscellaneous

The Federalist, Nos. 16, 27	77
-----------------------------	----

### OPINIONS BELOW

The opinion of the California Court of Appeal is reprinted at pages 62-85 of the Joint Appendix, and is reported in the advance-sheet edition of the California Appellate Reports at 195 Cal.App.3d 349, and in the West's California Reporter at 240 Cal.Rptr. 558. The order of the California Supreme Court denying appellant's petition for review of the court of appeal's decision is unreported and is reprinted at page 87 of the Joint Appendix. The order of the state trial court denying appellant's petition to compel arbitration, also unreported, is reprinted at pages 59-60 of the Joint Appendix.

### JURISDICTION

The statutory basis of the Court's jurisdiction in this case is 28 U.S.C. §1257(2), which confers jurisdiction of appeals from judgments of state courts "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its

validity." 28 U.S.C. §1257(2). The principal claim asserted by appellant at all levels of the proceedings below has been that section 1281.2(c) of the California Code of Civil Procedure is preempted and hence rendered invalid, as applied to this case, by provisions of the Federal Arbitration Act with which this state statute is in direct conflict (JA 67-73; J.S. Apps. E, pp. 2-8; F, pp. 3-5, 12-20; G, pp. 5-7, 23-25). The state trial court and court of appeal have rejected appellant's contention that section 1281.2(c) is preempted by the federal Act, and have accordingly sustained its application to this case as a basis for denying appellant's petition to compel arbitration (JA 59-60, 67-73). Under the decisions of this Court, such a ruling of a state court, rejecting a claim that the application of a state statute in a particular case is preempted by federal law, constitutes a "decision in favor of [the] validity" of the statute as against a contention that it is "repugnant to the Constitution, laws or treaties of the United States" within the



meaning of the governing statute. International Longshoremen's Assn. v. Davis, 476 U.S. 380, 387n.8 (1986); McCarty v. McCarty, 453 U.S. 210, 219-20n.12 (1981). See Perry v. Thomas, \_\_\_ U.S. \_\_\_, 107 S.Ct. 2520 (1987) (appeal accepted without discussion); Southland Corp. v. Keating, 465 U.S. 1 (1984) (semble); Fidelity Federal S. & L. Assn. v. de la Cuesta, 458 U.S. 141 (1982) (semble); 16 Wright et al., Federal Practice & Procedure §4012 at p. 603 (1977) (Court's appeal jurisdiction under 28 U.S.C. §1257(2) is "regularly exercised in cases involving conflict with federal statutes"). This statutory prerequisite to the assertion of this Court's appellate jurisdiction is therefore clearly satisfied in this case.

This case also fulfills the other condition prescribed by the governing statute for the Court's acceptance of jurisdiction over this appeal - namely, that the appeal be taken from a "[f]inal judgment or decree of the highest court of a State in which a decision could be had." 28 U.S.C. §1257(2). Appellant's claim

of preemption has been rejected on the merits by a final judgment of an intermediate appellate court of California, and the California Supreme Court has exercised its discretion to decline to review the case (JA 67-73, 87). In these circumstances, the intermediate appellate court is effectively constituted "the highest court of [the] State in which a decision could be had," and its judgment accordingly becomes reviewable by appeal to this court. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 678n.1 (1968); Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157, 160 (1954); American Ry. Exp. Co. v. Levee, 263 U.S. 19, 20 (1923). See Perry v. Thomas, supra (appeal accepted without discussion of this point); Fidelity Fed. S. & L. Assn. v. de la Cuesta, supra (semble); McCarty v. McCarty, supra (semble).

Finally, there is no question that this Court's jurisdiction has been timely and properly invoked by appellant. The judgment of the court of appeal was rendered on October 5, 1987, and appellant timely sought review of the

judgment by filing a petition for review in the state supreme court on November 12, 1987 (JA 62; J.S. App. G). See Calif. Rules of Court, Rules 24(a); 28(b). The order of the state supreme court denying appellant's petition for review was entered on December 17, 1987 (JA 87), and the notice of appeal was filed in the intermediate appellate court on January 14, 1988 (J.S. App. D), which is well within the time permitted by the governing statute for the taking of an appeal to this Court. 28 U.S.C. §2101(c) (90 days); American Ry. Exp. Co. v. Levee, supra at 20 (time runs from denial of discretionary review by state supreme court).

In its order granting review in this case, the Court postponed further consideration of the question of jurisdiction to the hearing on the merits, thus informing the parties that the Court is sufficiently concerned about some aspect of its jurisdiction over this appeal to warrant full briefing and argument on this subject. Appellant believes that the object of the Court's concern is not the question of appellant's compliance with the sort of

statutory prerequisites and time requirements that have been discussed above, but instead relates to the additional question, initially raised by appellee in its Motion to Dismiss or Affirm, whether the judgment of the court below may rest upon an "adequate and independent state ground" that would preclude review of the judgment by this Court. A full discussion of this issue would necessarily exceed the scope of the "[c]oncise statement of the grounds on which the jurisdiction of this Court is invoked" that is required to be set forth in this preliminary section of the brief under Rule 34.1(e) of the Rules of this Court. Appellant will therefore withhold treatment of this issue until the "Argument" section of the brief, wherein the issue will be discussed "at the outset" of appellant's argument in the manner required by the terms of Rule 16.8.

#### STATUTES INVOLVED

The constitutional and statutory provisions involved in this case are the Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl. 2), sections 1-4 of the Federal

Arbitration Act (9 U.S.C. §§1-4), and section 1281.2(c) of the California Code of Civil Procedure. These provisions have been reproduced in Appendix H to appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

Appellant Volt Information Sciences, Inc. ("Volt"), and appellee Leland Stanford Junior University ("Stanford") are parties to a construction contract pursuant to which Volt has constructed a system of electrical conduits connecting various computer facilities on the Stanford campus (JA 29). Only two of the provisions of this voluminous contract are directly relevant to this appeal. The first of these, the choice-of-law clause, appears in a section of the contract entitled "General Conditions," which consists of a standard-form agreement widely used in the construction industry and generally known as "AIA Document A201" (JA 36). This clause provides simply that "[t]he Contract shall be governed by the law of the place where the project is located" (JA 37).



The other pertinent clause of the agreement, the arbitration clause, appears in a separate section of the contract entitled "Supplementary General Conditions," which consists of a series of special provisions prepared by Stanford that modify the standard-form General Conditions in various respects (JA 40). This particular clause provides that the arbitration clause appearing in the standard-form agreement shall be deleted, and that the following provision shall be inserted in its stead (id.):

"All claims, disputes and other matters in question between the parties to this contract, arising out of or relating to this contract or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing unless the parties mutually agreed [sic] otherwise. In any other arbitration, commenced or demanded pursuant to this Contract, then either party hereto, upon the written request of the other party, shall join in such arbitrations and agree to the consolidation of the arbitrations. This agreement to arbitrate and to join and consolidate arbitrations shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in any court having jurisdiction thereof."

The principal difference between this

provision and the arbitration clause in the standard-form agreement which it displaces concerns the conditions under which an arbitration between the parties may be consolidated with another arbitration of a dispute between one of the parties and a third person arising out of the same project. The standard-form clause would have expressly prohibited consolidation of such third-party disputes without the written consent of all concerned parties (JA 37-38). By contrast, the substituted special provision quoted above not only pointedly omits any such prohibition, but additionally includes an express mandate for the consolidation of separate arbitrations that might arise from the parties' transaction (JA 40).

Stanford thus clearly contemplated the possibility of potentially duplicative proceedings resulting from disputes with the various participants in the project, and deliberately chose to deal with this problem, not by inserting a proviso excusing the parties from their duty to arbitrate in that event, but

rather by simply authorizing the consolidation of any separate arbitrations that might result from such disputes. Having chosen this course, however, Stanford then inexplicably neglected to include arbitration clauses in the agreements which it entered into with these other participants (Joint Appendix filed by the parties in the court of appeal, pp. 126, 135, 144). The contracts with the project architect and the construction manager, in particular, omitted any provision for arbitration of disputes arising under those contracts (id.).

During the course of the project, various disagreements arose between Volt and Stanford which the parties were unable to settle by negotiation (see JA 51-52). Accordingly, at the conclusion of the project, Volt submitted to Stanford a demand for arbitration of these disputes pursuant to the arbitration clause of the parties' contract (JA 49). Stanford, however, refused to proceed with the arbitration, and instead filed suit against Volt in the state superior court (JA 6). In its complaint, Stanford asserted several causes of

action against Volt involving all of the same matters that were the subject of Volt's demand for arbitration (JA 12-21). In addition, the complaint stated a single cause of action for declaratory relief against the architect and construction manager, in which Stanford sought a declaration that, in the event it should be held liable to pay any damages to Volt, these firms should be required to indemnify it for any amount thus paid (JA 22-24).

Volt thereupon petitioned the superior court, pursuant to both the Federal Arbitration Act, 9 U.S.C. §§1 et seq., and the California Arbitration Act, Calif.Code Civ.Proc. §§1280 et seq., to compel arbitration and to stay the prosecution of Stanford's claims against it pending the outcome of the arbitration (JA 42). Stanford, in turn, moved to stay the arbitration, contending that arbitration of its dispute with Volt could not be compelled during the pendency of litigation involving additional claims against the architect and construction manager arising out of the same transaction which could not be arbitrated because of the

omission of any arbitration clause from its agreements with those parties (Joint Appendix filed by the parties in the court of appeal, p. 209). In support of its motion, Stanford relied on the provisions of section 1281.2(c) of the California Code of Civil Procedure, which permits a superior court to deny a petition to compel arbitration or to stay a pending arbitration when "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact."

In its opposition to Stanford's motion, Volt contended that section 1281.2(c) was inapplicable in the circumstances presented here, and that in any event, since this project involved interstate commerce, this state statute was effectively preempted by the conflicting requirements of the Federal Arbitration Act, which do not permit avoidance of an arbitration agreement on the grounds



specified by this statute (J.S. App. E). In its response to this latter contention, Stanford did not dispute that the application of federal law would indeed require enforcement of its agreement to arbitrate, but instead contended that the federal Act was rendered inapplicable in this context by the provision of the parties' agreement specifying that its enforcement should be governed by "the law of the place where the project is located" (Joint Appendix filed by the parties in the court of appeal, pp. 225-27).

Apparently in reliance on this choice-of-law clause, the superior court rejected Volt's argument that Code Civ.Proc. §1281.2(c) was preempted by federal law and held that this statute effectively excused Stanford from its obligation to arbitrate (JA 59-60). The court accordingly entered an order denying Volt's petition to compel arbitration and granting Stanford's motion to stay the arbitration until the conclusion of the lawsuit (id.).

Volt filed a timely appeal to the California Court of Appeal for the Sixth Appellate

District, reiterating its contention that Calif.Code Civ.Proc. §1281.2(c) was preempted by the contrary prescriptions of the Federal Arbitration Act (J.S. App. F). On the specific issue of the effect of the choice-of-law clause, Volt argued (1) that the clause did not in fact preclude the application of federal law because the phrase "law of the place where the project is located" necessarily encompassed all of the law - local, state, and federal - that was in fact applicable at the project site; (2) that the same result would follow even if this phrase were construed as an exclusive reference to California law, because the nature of the federal system is such that federal law constitutes an integral part of the law of California, as of every other state; and (3) that in any event, a substantial body of authority had held that any such contractual choice-of-law provision that purported to foreclose the application of the Federal Arbitration Act to a transaction that would otherwise be subject to its terms should simply be invalidated as an illicit attempt to subvert

the objectives of the Act (id., pp. 11-20).

The court of appeal rejected all of these arguments and affirmed the superior court's order in an opinion in which two members of the court joined (JA 62-80). The court held that application of the federal Act was foreclosed by the choice-of-law clause and accordingly rejected Volt's preemption claim and sustained the superior court's reliance on Code Civ.Proc. §1281.2(c) as a proper basis for denying Volt's petition to compel arbitration (id.). The third member of the court dissented from this ruling, stating his view that the choice-of-law clause did not preclude the application of federal law to this case, because, in his words, "even assuming arguendo that it must be interpreted as an agreement to have California law govern, ... where federal law is supreme, California law mandates that federal law controls" (JA 81-85).

Volt filed a timely petition for review in the California Supreme Court, again reiterating all of the arguments it had made in the courts below and, in addition, calling the court's

attention to the several conflicting resolutions of the question presented by this case that had been reached by various appellate courts in California and elsewhere (J.S. App. G). On December 17, 1987, the California Supreme Court issued its order denying Volt's petition for review (JA 87). By the same order, the court directed that the court of appeal's opinion should not be published in the permanent edition of the official California Appellate Reports (id.). Volt filed its notice of appeal to this Court on January 14, 1988, and its Jurisdictional Statement on February 8, 1988 (J.S. App. D). On March 28, 1988, the Court entered its order granting a hearing of the appeal and postponing further consideration of the question of jurisdiction to the hearing on the merits.

#### SUMMARY OF ARGUMENT

1. Jurisdiction. For several reasons, the decision of the court of appeal cannot be said to rest upon an "adequate and independent state ground." First of all, each of the issues decided by the court is, in the last analysis,

an issue of federal law rather than state law. While it is true that both choice of law and the interpretation of private contracts are ordinarily viewed as exclusive domains of the state courts, the issues presented here do not properly fall within either of these categories in any usual sense. The particular "choice of law" required in this case is a choice between federal and state law rather than between the laws of different states. Lest the application of the Supremacy Clause be entirely delegated to the state courts, this sort of "choice of law" must necessarily be treated as an exclusively federal concern. As for the matter of contract interpretation, the court of appeal's peculiar construction of the choice-of-law clause has transformed that provision into an effective waiver of Volt's federally guaranteed right to compel arbitration of the parties' dispute. It is well settled that the interpretation and application of such an alleged waiver of rights conferred by federal law are likewise exclusive federal prerogatives. Moreover, in any event, the court's



interpretation of the clause is not based on an application of any general rules of state law, but instead relies solely on a narrow "rule" of its own making to the effect that a choice-of-law clause of the kind presented here must be construed to preclude the application of federal law to the parties' contract. Such a narrowly focused "rule," whose only function is to determine the applicability of federal law, should not be regarded as a rule of state law at all, let alone a matter of sufficient of state interest to foreclose review of a state court's decision under the doctrine of "adequate and independent state ground."

Secondly, even if the court of appeal's construction of the choice-of-law clause were to be regarded as based upon principles of state law, it would not be insulated from review under this doctrine in any event, because it does not rest upon any grounds which are either "independent" or "adequate" within the meaning of those terms as they have been defined in the decisions of this Court. The

court's interpretation of the clause is not "independent" of the principles of federal law because (1) it logically depends upon a resolution of the preeminently federal question whether federal law is in fact a part of the "law of the place where the project is located," and (2) its validity must ultimately be assessed under the standards imposed by the settled federal rule that any arbitration agreement subject to the Federal Arbitration Act must be liberally construed to promote the federal policy favoring the arbitration of private disputes. Nor is the court's disposition of this issue "adequate" in the sense of being sufficient to sustain its judgment without the resolution of any additional federal issues, because the ultimate effect of accepting the court's interpretation of the choice-of-law clause would simply be to render that clause invalid as applied to this case on the ground that it violates the federal public policy manifested by the Federal Arbitration Act. Finally, the court's decision is not "adequate" in the additional sense of resting

upon a "fair or substantial basis," because, as will be shown in the argument on the merits, it manifestly contravenes, not only the plain language of the contract, but every relevant legal principle that ought to bear upon the interpretation of this type of provision.

2. Basic Rules Governing Application of the Arbitration Act to This Case. There is no serious controversy that the Federal Arbitration Act would govern this case and would require arbitration of the parties' present dispute if its application to the case were not prevented by the court of appeal's interpretation of the choice-of-law clause. The project at issue here easily satisfies the interstate-commerce requirements of the Act, and the only objection to arbitration raised by Stanford - the pendency of litigation involving related non-arbitrable claims against third parties - would not afford a legitimate defense to enforcement of the arbitration agreement under federal law.

3. Interpretation of the Choice-of-Law Clause. Several compelling considerations

effectively rebut the court of appeal's conclusion that the choice-of-law clause in the parties' contract must be interpreted to exclude the application of federal law to this transaction. Such an interpretation is, first of all, a historical anomaly, inasmuch as choice-of-law principles in general and contractual choice-of-law provisions in particular have traditionally been applied only to resolve conflicts between the laws of coequal sovereigns, and have never been viewed as pertinent to the relationship between state and federal law or as purporting to resolve issues of federal preemption. Second, this interpretation is belied by the clear literal terms of the parties' contract, including both the choice-of-law clause itself, which on its face encompasses all of the several bodies of law that are in fact applicable at "the place where the project is located," and the remaining provisions of the contract, which contain several clear indications that otherwise applicable federal laws were meant to govern the execution of this project. Third,

the notion that the term, "the law of the place where the project is located," does not encompass federal law is additionally at variance with the fundamental principle that federal law is an inherent part of the laws of every state and of every "place" in the federal union. Fourth, although there is no specific evidence of the intent underlying the parties' adoption of the choice-of-law provision, the circumstantial evidence strongly suggests that the disallowance of federal remedies would frustrate the parties' intent to require arbitration of precisely the type of dispute that arose in this case. Fifth, the view that the application of the Federal Arbitration Act might be foreclosed by a contractual choice-of-law provision is contrary to both the overwhelming weight of authority on this precise issue in the lower courts and the only prior decisions of this Court that have any bearing on the issue. Finally, insofar as the lower court's interpretation of the choice-of-law clause has prevented enforcement of the parties' contractual duty to arbitrate their



dispute, this interpretation infringes the established rule that, in construing any contractual provision affecting the arbitrability of a dispute subject to the Federal Arbitration Act, all doubts must be resolved in favor of compelling arbitration.

4. Invalidity of the Choice-of-Law Clause as Interpreted by the Court of Appeal. Even if the court of appeal's interpretation of the choice-of-law clause were to be accepted, reversal of its judgment would still be required because that interpretation would effectively render the clause invalid and unenforceable. The courts of all jurisdictions, including this Court, have consistently held that a contractual choice-of-law provision should be disregarded if the result of its application would contravene a fundamental public policy of the jurisdiction whose law would otherwise apply to the transaction. The courts have also generally declined to accede to such a provision where it would effectively nullify one of the obligations imposed by the parties' contract. Under these settled rules,

the choice-of-law clause in the Volt-Stanford contract would be rendered unenforceable by acceptance of the court of appeal's interpretation of that clause, since that interpretation would both nullify the parties' contractual duty to arbitrate their present dispute and contravene the fundamental federal policy favoring the settlement of such disputes by arbitration. The majority of lower courts have reached precisely this result with respect to any choice-of-law provision purporting to foreclose reliance on the Federal Arbitration Act and thereby to prevent enforcement of an arbitration agreement. In the event this Court should be compelled to address this issue by its acceptance of the court of appeal's interpretation of the choice-of-law clause in this case, it should likewise hold that the clause, as so interpreted, is unenforceable as a violation of federal public policy.

\*\*\*\*

## ARGUMENT

### I. The Court of Appeal's Judgment Does Not Rest Upon an "Adequate and Independent State Ground" That Would Preclude Review of the Judgment by This Court.

By its order postponing further consideration of the question of jurisdiction, the Court has indicated that it has some doubt regarding its jurisdiction over this case. The apparent source of this doubt is Stanford's contention, in its Motion to Dismiss or Affirm, that the decision of the court of appeal consisted of nothing more than an adjudication of ordinary issues of choice of law and contractual interpretation that are customarily viewed as exclusive responsibilities of the state courts (Motion to Dismiss or Affirm, pp. 14-15). Stanford's argument to this effect has evidently suggested to the Court the possibility that the judgment below may rest upon an "adequate and independent state ground" that would preclude review of the judgment by this Court. Volt will demonstrate in this section of the brief that the judgment of the court of appeal is not in fact insulated from review by this jurisdictional limitation, because the

grounds on which it rests are not state-law grounds at all, and, in any event, could not be viewed as either "adequate" or "independent" within the settled meaning of those terms.

A. All of The Issues Presented by This Appeal Are Exclusively Issues of Federal Law.

Except in a very superficial sense, this case does not actually involve any issues of state law. While it is true that the general subjects of choice of law and contract interpretation are ordinarily regarded as the exclusive concern of the state courts and legislatures, the specific issues presented in this case exhibit certain special characteristics that clearly remove them from the operation of this general rule and place them squarely within the category of exclusively federal questions that this Court is fully competent to adjudicate.

1. The So-Called "Choice-of-Law" Issue Is Really an Issue of Federal Supremacy.

This point is most easily demonstrated with respect to the so-called "choice-of-law" issue that is presented by this case. Stanford has correctly noted, citing Day & Zimmerman, Inc.

v. Challoner, 423 U.S. 3 (1975), that the federal courts, including this Court, are ordinarily bound by decisions of the state courts on issues of choice of law (Motion to Dismiss or Affirm, p. 14). All of the decisions that have established this rule, however, including Challoner and its better known predecessor Klaxon v. Stentor Mfg. Co., 313 U.S. 487 (1941), have involved what might be called be "horizontal" choices between the laws of two different states. The particular "choice of law" at issue in this case, by contrast, is a "vertical" choice between state and federal law. The rule of the Challoner and Klaxon decisions has never been applied to this type of "choice of law," and indeed no court, with the exceptions of the court of appeal in this case and the courts that rendered the two earlier aberrant decisions relied upon in the court of appeal's opinion, has even purported to treat this type of conflict between state and federal laws as presenting a "choice of law" problem. Quite plainly, the issue posed by such a conflict is not one of "choice of



law" at all, but is instead a straightforward issue of federal supremacy that must be adjudicated according to the familiar principles of federal constitutional law that have been developed by this Court in the course of its application of the Supremacy Clause of the United States Constitution.

Because it has so seldom occurred to any court or litigant to treat this type of federal-state conflict as a "choice of law" problem, no direct citation can be provided for this conclusion. (But cf. the numerous decisions cited in part III.E below holding or assuming that a contractual choice-of-law clause does not displace otherwise applicable federal law). Volt submits, however, that the point is sufficiently obvious to require no citation. Indeed, any other conclusion would effectively subsume all issues of federal supremacy under the heading of "choice of law," and would thus, under the rule of Klaxon and Challoner, consign the entire area of Supremacy Clause adjudication to the courts of the fifty states. This is of course an inadmissible

result. It follows that there is no "choice-of-law" issue presented by this case in any acceptable sense of that term. The issue Stanford has sought to characterize as such is really a prototypical issue of federal supremacy which this Court is perfectly free to decide without deference to any prior ruling on the issue by a state court.

2. The Issue of Contract Interpretation Likewise Presents a Federal Question.

The same conclusion must be drawn with respect to the issue of contract interpretation, albeit for slightly less obvious reasons. Once again, it is true, as Stanford has noted, that the interpretation and application of private contracts are ordinarily viewed as presenting questions of state law. For two very compelling reasons, however, this general principle is inapplicable to the particular contract interpretation at issue in this case. The first of these reasons consists of a specific exception to this rule which this Court has carved out for contractual releases or waivers of rights conferred by federal statutes. The other reason derives from a

unique feature of the particular state-court ruling at issue here which entirely removes that ruling from the scope of the general principle that ordinarily accords primacy to state-court interpretations of private contracts.

a. This Issue Involves a Purported Waiver of Federal Rights That Must Be Adjudicated by Federal Standards.

As construed by the court of appeal, the choice-of-law clause in the Volt-Stanford contract not only effectuates a choice between the laws of different states, but also entirely precludes the application of federal law to this transaction. Under this interpretation, therefore, any rights under federal law which the parties might otherwise have enjoyed by virtue of their participation in the transaction were effectively relinquished by their adoption of this clause. The court of appeal's construction of the clause has thus transformed it into the precise equivalent of an advance waiver or release of all of the rights and benefits conferred on the parties by federal law, including specifically their right to

enforce the arbitration clause in their agreement pursuant to the terms of the Federal Arbitration Act. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637n.19 (1986).\*

This Court has several times held that the interpretation and application of this sort of purported waiver or release of rights conferred by a federal statute must be treated as a question of federal law that should be resolved without reference to state-law rules governing the construction of ordinary contracts. Zenith Radio Corp. v. Hazeltine Research Co., 401 U.S. 321, 343-44 (1971); Aro Mfg. Co. v. Convertible Top Co., 377 U.S. 476, 500-1 (1964); Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S.

---

\* In the cited passage of its opinion in the Mitsubishi case, this Court acknowledged the potential equivalence between a choice-of-law clause and a waiver of federal rights by relying on decisions involving the validity of waivers of federal antitrust claims to support its observation that an international choice-of-law clause might be invalidated if were found to preclude enforcement of a claim asserted under American antitrust law. Id. This and other aspects of the Mitsubishi decision will be discussed more fully in the argument on the merits.

359, 361-62 (1952); Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704-7, 715 (1944); Garrett v. Moore-McCormack Co., 317 U.S. 239, 243-47 (1942); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 175-76 (1942). See Liner v. Jafco, Inc., 375 U.S. 301, 308-9 (1964). Although each of these decisions involved a particular federal statute, there is no indication in any of the opinions that the rule there enunciated was intended to be anything other than a rule of general application, and indeed the broad language of several of the opinions is clearly suggestive of such a general principle. E.g., Sola Elec. Co. v. Jefferson Elec. Co., supra at 176 ("the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or common law rules").\* The lower

---

\* In recent years, this Court has evidenced a somewhat greater reluctance to enunciate uniform rules of federal law to govern the various incidents of rights conferred by federal statutes, and has instead often chosen to incorporate or "borrow" principles of state law to serve this purpose. E.g., Burks v. Lasker, 441 U.S. 471, 477-78 (1979); United States v. Kimbell Foods, Inc., 440 U.S. 715, 727-29 (1979); Robertson v. Wegmann, (contd.)



courts, at any rate, have generally applied the rule to require resort to federal law in adjudicating the scope and validity of waivers

---

(footnote contd.) 436 U.S. 584, 591-92 (1978). See United States v. Little Lake Misere Land Co., 412 U.S. 580, 594-95 (1973). Even if this "borrowing" approach were now to be applied in determining the validity of releases of federal statutory rights, however, this would not affect the particular point being made here. In each of the cases in which this approach has been utilized, the Court has gone out of its way to reaffirm that its decision ultimately turns upon federal law, and that its adoption of a state rule to resolve a particular issue is motivated, not by any compulsion or lack of authority to do otherwise, but rather by a determination that this course seems best suited to the purposes of the federal statutory scheme. E.g., Burks v. Lasker, supra at 476-77; United States v. Kimbell Foods, Inc., supra at 726-27; Robertson v. Wegmann, supra at 588. See United States v. Little Lake Misere Land Co., supra at 592-93; United States v. Standard Oil Co., 332 U.S. 301, 305-7 (1947); D'Oench, Dume & Co. v. FDIC, 315 U.S. 447, 471-72 (1942) (Jackson, J., concurring). In effect, under this approach, the state rule being adopted as the rule of decision simply becomes a rule of federal law. Id. Thus, while a decision to pursue this "borrowing" approach as to the validity of a release of a federal statutory right might alter the outcome of a particular case on the merits, it would have no effect on the Court's jurisdiction in a case arising from a state court, since the ultimate dependence of the decision on federal law clearly forecloses any argument that the Court's authority to decide the case might be nullified by an "adequate and independent state ground." RFC v. Beaver County, 328 U.S. 204, 206-7, 210 (1946) (implicit holding to this effect).

or releases of virtually every variety of federal statutory claim. E.g., Gamewell Mfg. Co. v. HVAC Supply, Inc., 715 F.2d 112, 113-16 (4th Cir. 1983) (patent laws); Parker v. DeKalb Chrysler-Plymouth, Inc., 673 F.2d 1178, 1180 (11th Cir. 1982) (Truth in Lending); Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1208-9 (5th Cir. 1981) (Title VII); Jones v. Taber, 648 F.2d 1201, 1203 (5th Cir. 1981) (Civil Rights Act); Ott v. Midland-Ross Corp., 523 F.2d 1367, 1368-69 (6th Cir. 1975) (Age Discrimination Act); Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 888-91 (3d Cir. 1975) (Sherman Act); Redel's, Inc. v. General Elec. Co., 498 F.2d 95, 98-99 and n.2 (5th Cir. 1974) (Sherman Act). See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 637n.19 (citing with approval Redel's, Inc. v. General Elec. Co., supra, and other decisions to the same effect). At this stage, therefore, it is fair to conclude that these decisions have established a general doctrine to the effect that federal rather than state law must provide the ultimate standard for

interpreting or applying any such purported waiver or release of a federal right. While no decision to date has addressed the question in a case involving the Federal Arbitration Act, the general scope of this doctrine would clearly seem to encompass a waiver of any rights conferred by the terms of that Act.\*

---

\* The lower federal and state courts have in fact addressed a closely related question regarding alleged waivers of the right to compel arbitration pursuant to the Act. In numerous decisions, the courts have unanimously held that the question whether a party has waived his right to arbitration under the Act by undue delay in the assertion of that right presents a federal issue that must be resolved in exclusive accordance with federal law. E.g., Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1158-59 (5th Cir. 1986); Maxum Foundations Inc. v. Salus Corp., 779 F.2d 974, 981-84 (4th Cir. 1986); In re Mercury Constr. Corp., 656 F.2d 933, 938-40 (4th Cir. 1981), affd. sub nom. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); E.C. Ernst, Inc. v. Manhattan Constr. Co., 551 F.2d 1026, 1040 (5th Cir. 1977); Hart v. Orion Ins. Co., 453 F.2d 1358, 1360-61 (10th Cir. 1971); Hilti, Inc. v. Oldach, 392 F.2d 368, 370-72 (1st Cir. 1968); ADC Constr. Co. v. McDaniel Grading Co., 338 S.E.2d 733, 737-38 (Ga.App. 1986); Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634, 638 (Tex. Civ.App. 1973). Since this type of waiver is specifically treated in the provisions of the Act itself, however, these decisions probably cannot be regarded as directly applicable to the sort of contractual waiver that is involved in this case. 9 U.S.C. §3 (precludes arbitration where party is "in default in proceeding with such arbitration"). (continued)

As shown above, the court of appeal has enforced precisely such a waiver of Volt's rights under the Federal Arbitration Act by its interpretation of the choice-of-law clause in the parties' contract. It follows, under the rule just described, that the correctness of that interpretation ultimately presents a question of federal law, and therefore, a fortiori, that this Court's consideration of that question cannot be foreclosed on the basis of an alleged "adequate and independent state ground."

b. The Only Principle of Contract Interpretation upon Which This Issue Turns Is a Principle Whose Sole Function Is to Determine the Applicability of Federal Law.

Besides the specific rule governing waivers of federal rights, there is yet another, more fundamental reason why the court of appeal's

---

(footnote contd.) The only possible exception to this generalization is the decision of the Fourth Circuit in Maxum Foundations, Inc. v. Salus Corp., supra, where a party was charged with having waived his right to compel arbitration, not only by delay, but also by having entered into a settlement agreement, and where the court apparently relied upon federal law to dispose of both of these issues. Id., 779 F.2d at 981-84.



interpretation of the choice-of-law clause must be viewed as presenting a purely federal issue. The supposed state-law ground that is claimed to foreclose review of the lower court's judgment in this case is of a very different sort from the state-law principles that have been claimed to constitute "adequate and independent state grounds" in all of the prior cases involving this jurisdictional issue that have come before this Court. In those earlier cases, the principle in question was invariably a rule of general application, not only to claims asserted under federal law, but to the entire range of claims and disputes arising under state law as well. E.g., International Longshoremen's Assn. v. Davis, 476 U.S. 380 (1986) (scope of state court's jurisdiction); Ake v. Oklahoma, 470 U.S. 68 (1985) (uniform state procedural rule); South Dakota v. Neville, 459 U.S. 553 (1983) (state constitutional provision); Zacchini v. Scripps-Howard Broadcasting Corp., 433 U.S. 562 (1977) (state law of intellectual property); Demorest v. City Bank Farmers Trust Co., 321 U.S. 37 (1944)



(state rule for allotment of trust income); Fox Film Corp. v. Muller, 296 U.S. 207 (1935) (rule governing severability of invalid contract provisions); Abie State Bank v. Bryan, 282 U.S. 765 (1931) (doctrine of estoppel by acceptance of benefits of contract); Fox River Paper Co. v. Railroad Comm., 274 U.S. 651 (1927) (property rights of riparian owners).

The purported state-law ruling involved here is not at all of this kind. The court of appeal, in its opinion, has invoked no general rule of contract interpretation or choice of law - or indeed any general principle of state law whatever - to justify its construction of the choice-of-law clause (JA 66-67). Rather, the only rationale for that construction offered by the court is its own conclusory pronouncement to the effect that "[w]e have no doubt" that the particular terms of this clause were meant to exclude federal law from any application to this controversy (JA 66).\*

---

\* It is true that the court also cites certain authorities to support its interpretation of the clause. Only two of the cited decisions, however, even address the issue (continued)

If this conclusory determination involves any legal principle at all, it consists of nothing more than a very specialized rule narrowly prescribing that the parties' adoption of a choice-of-law clause selecting the law of a particular place or state shall be deemed to preclude the application of federal statutes to the parties' transaction. It is a rule, in other words, whose sole subject and purpose is a determination of the applicability of federal law in cases involving a certain kind of choice-of-law clause.

Volt submits that this unique variety of state-law rule - that is, a rule whose exclusive concern is the role to be assigned to

---

(footnote contd.) presented here, and their resolution of the issue is even more cryptic and conclusory than that of the court of appeal in this case. Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., 191 Cal.Rptr. 15, 18 (Cal.App. 1983); Standard Co. of New Orleans v. Elliott Constr. Co., 363 So.2d 671, 677 (La. 1978). These two decisions, together with the numerous contrary decisions on the question, will be discussed below in the argument on the merits, where it will be shown that the court of appeal's ruling in fact has no significant authoritative support, and indeed contravenes the overwhelming weight of authority on this issue, both in other jurisdictions and in California itself.

federal law in the resolution of a particular type of dispute - cannot properly be treated as providing an "adequate and independent state ground" for a state court's decision. Not being a rule of general application, it certainly does not implicate any of the policies underlying the principle that this Court has no authority to adjudicate substantive questions of state law - such as the desirability of uniformity in the application of state-law rules without regard to the forum in which they are applied, and respect for the independent constitutional role of state law as the primary source of most of the substantive legal rules that govern private relations. See Michigan v. Long, 463 U.S. 1032, 1040 (1983); RFC v. Beaver County, supra, 328 U.S. at 210; Murdock v. City of Memphis, 20 Wall. (87 U.S.) 590, 626, 630 (1875); 16 Wright et al., Federal Practice & Procedure, §4021, pp. 679-82 (1977). Cf. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). At the same time, since the only function of this rule is to determine whether federal law applies to a particular trans-

action, the federal interest in the substantive content of the rule would appear to be paramount if not exclusive - indeed, of the same order of magnitude as the federal interest in the resolution of any question of federal supremacy. Cf. United States v. Little Lake Misere Land Co., supra, 412 U.S. at 595-96; Liner v. Jafco, Inc., supra, 375 U.S. at 308-9; Ward v. Love County, 253 U.S. 17, 24 (1920). These considerations would seem to compel the conclusion that this specialized rule of contract interpretation should not even be treated as a legitimate subject of state law at all, let alone a matter of sufficient state concern to foreclose this Court from even undertaking to review a state-court decision applying the rule.

Supportive authority for this conclusion is difficult to find, in part because the conclusion itself is so elementary, and in part because of the unique character of the particular state-law rule at issue here. Perhaps the closest analogue is the decision of this Court in United States v. Little Lake Misere

Land Co., supra, 412 U.S. 580, where the Court laid down a general principle that would deny any effect to a rule of state law that discriminates against federal interests or specifically purports to abrogate rights that have been acquired pursuant to a federal statute. Id., 412 U.S. at 595-97. See also id. at 607-8 (Rehnquist, J., concurring). Since the purported rule of contract interpretation at issue here is precisely and narrowly intended to foreclose the application of federal law, and thus to abrogate federally guaranteed rights, in all of the situations that are covered by the rule, this analogy seems entirely appropriate. The principle enunciated by the Court in Little Lake Misere thus serves to provide further support, if any were needed, for the otherwise self-evidently sound proposition that a purported state-law rule having no purpose or effect other than to foreclose reliance on a federal statute cannot be accorded the status of an "adequate and independent state ground" for a state court's decision refusing to enforce such a statute.



3. This Court Has Previously Assumed, by Accepting Jurisdiction to Decide This Same Issue in the de la Cuesta Case, That the Issue Presented by This Appeal Is a Federal Question Appropriate for Decision by This Court.

---

Although the Court's request for briefing on the issue of its jurisdiction indicates that it does not consider this question as having been foreclosed by precedent, it nevertheless should be mentioned that the Court has already resolved this jurisdictional issue on at least one occasion, albeit sub silentio, by its assumption of jurisdiction to decide the precise question that is presented on the merits of this appeal. The decision referred to, which will be discussed at greater length in Volt's argument on the merits, is the decision of the Court in Fidelity Federal S. & L. Assn. v. de la Cuesta, 458 U.S. 141 (1982). In that case, one of the alternative grounds that had been relied upon by the state court of appeal in dismissing a preemption challenge to a state rule governing the effect of "due-on-sale" clauses in certain mortgage agreements was a provision in the agreements specifying that they should be "governed by the law of the

jurisdiction in which the property is located." Id., 458 U.S. at 150-51. The state court had interpreted this provision to preclude the application of federal law to the parties' transactions. Id. This Court proceeded to address and reject this interpretation on its merits, holding that "the law of the jurisdiction" should instead be construed to include federal as well as state law. Id., 458 U.S. at 157n.12. Nowhere in the Court's discussion of this issue is there any reference to the possibility that the state court's interpretation of the mortgage agreements might have been insulated from review by the doctrine of "adequate and independent state ground." The implication is clear that the Court regarded this issue as a federal question which it was authorized to decide without deference to the contrary views of the state court.\*

---

\* The fact that the contract at issue in de la Cuesta consisted of a standard-form contract promulgated by a federal agency, incidentally, does not provide an independent explanation for the Court's assumption of jurisdiction which would distinguish that decision from the present case. The regulations of the agency authorized, but did not require, the (contd.)

Admittedly, a holding sub silentio is not the most persuasive form of authority. Nonetheless, when the precedential effect of the de la Cuesta decision is added to the several persuasive considerations that have been adduced in the earlier discussion, the conclusion is compelled that the issue presented by this case must ultimately be treated as a federal question to which the doctrine of "adequate and independent state ground" should have no application whatsoever.

B. In Any Event, Even if the Court of Appeal's Ruling on the Interpretation Issue Could Properly Be Viewed as Resting Upon Principles of State Law, That Ruling Would Not Present an "Adequate and Independent State Ground" for the Court's Judgment.

Even if the Court should decide, despite the contrary conclusion drawn in the preceding

---

(footnote contd.) use of the form contract by lending institutions, and the decision whether to use the form was therefore left to the discretion of each institution. Id., 458 U.S. at 146-47, 155. Indeed, one of the mortgages involved in the case did not incorporate certain of the provisions of the standard-form contract. Id. at 148, 151n.8. Notwithstanding their federal source, therefore, the contracts at issue in that case were essentially private contracts no different from the contract between Volt and Stanford in this case.

discussion, that the court of appeal's interpretation of the choice-of-law clause was in fact based on an application of state law, that interpretation would still fall short of providing an "adequate and independent state ground" for the court's judgment, because it fails to satisfy any of the specific conditions that have been imposed by this Court as prerequisites to the invocation of this doctrine to foreclose review of a state court decision. Specifically, as will now be shown, the state court's ruling is neither "independent" of certain intertwined issues of federal law, "broad enough to sustain the judgment" without consideration of additional federal questions, nor supported by any "fair or substantial basis" for the particular interpretation of the choice-of-law clause that was adopted by the court.

1. The Court of Appeal's Decision on This Issue Is Logically Dependent upon and "Interwoven" with the Resolution of at Least Two Issues of Federal Law.

It is well settled that a state court's mere reliance on a rule of state law to justify its decision will not be deemed to provide an

"adequate and independent state ground" for the judgment unless the court's application of the rule is truly "independent" in the sense that it does not presuppose a resolution of some underlying issue of federal law. International Longshoremen's Assn. v. Davis, supra, 476 U.S. at 388-89; Ake v. Oklahoma, supra, 470 U.S. at 74-75; Xerox Corp. v. Harris County, 459 U.S. 145, 149 (1982); Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 290 (1958). Thus, where the state law cannot properly be applied unless the federal issue is first resolved in a certain fashion, no "adequate and independent state ground" for the court's decision will be found to exist, and its decision will accordingly be deemed subject to plenary review by this Court. Id. The same result will follow where it appears that the federal and state issues are logically so "interwoven" as to be incapable of independent determination. Ake v. Oklahoma, supra, 470 U.S. at 75; Michigan v. Long, supra, 463 U.S. at 1040-41; Abie State Bank v. Bryan, supra, 282 U.S. at 773; Enterprise Irrig. Dist. v. Farmers Mutual Canal Co.,



243 U.S. 157, 164 (1917).

In the present case, the state court's interpretation of the choice-of-law clause is logically dependent upon and "interwoven" with the resolution of federal issues in at least two important ways. First, as the court of appeal itself concedes in its opinion (JA 66), there is no extrinsic evidence supporting its interpretation of this clause, and that interpretation is therefore completely contingent upon ascertainment of the literal meaning of the operative words "law of the place where the project is located." The meaning of those words, in turn, can only be ascertained by determining what law, in fact, comprises "the law of the place where the project is located." The specific question presented in this case - namely, whether those words encompass federal law as well as state law - can likewise only be resolved by determining whether federal law, in particular, is in fact applicable at that "place." Yet this latter question - whether federal law should properly be deemed to comprise a part of the law applicable at a

certain "place" within the United States - is obviously a federal question. Indeed, it might properly be characterized as the preeminent federal question. U.S. Const., Art. VI, cl. 2. Thus, in the end, the interpretation of the choice-of-law clause is and was necessarily dependent upon a logically prior answer to a quintessential question of federal law. Under the settled rule described above, this conclusion inherently deprives the state court's disposition of this issue of the requisite "independence" without which it cannot be accorded the status of an "adequate and independent state ground" for the court's judgment.

Secondly, the court of appeal's interpretation of the choice-of-law clause embodies an even more fundamental dependence upon an additional aspect of federal law, which consists of the settled rule that any interpretation of a contract determining the arbitrability of a dispute under the Federal Arbitration Act must be infused by a sympathetic attunement to the federal policy

favoring arbitration. This rule was given its most complete exposition in this Court's recent opinion in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 626, where the Court stated, quoting from its earlier opinion in Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra:

"[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.' Moses H. Cone Mem. Hospital, 460 U.S., at 24. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400-404 (1967); Southland Corp. v. Keating, 465 U.S. 1, 12 (1984). And that body of law counsels

'that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. ... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.' Moses H. Cone Memorial Hospital, 460 U.S., at 24-25.

See, e.g., Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960). Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."

Since the Arbitration Act is to be uniformly applied "in either state or federal court" (Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, 460 U.S. at 24), the policy enunciated in this passage necessarily pertains to cases arising from state courts as well as federal courts, and so the court has held on more than one occasion. Perry v. Thomas, \_\_\_ U.S. \_\_\_, 107 S.Ct. 2520, 2525 (1987); Southland Corp. v. Keating, 465 U.S. 1, 10, 15n.7 (1984). See Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, 460 U.S. at 24.

Given the existence of this strong federal policy prescribing the basic methodology of interpretation, no state-court construction of any contractual provision which determines the arbitrability of a dispute subject to the Federal Arbitration Act can ever be truly "independent" of the influence of federal law. At the least, a state court's resolution of this issue is subject to review to the extent of ascertaining whether the terms of the parties' agreement have been "generously construed" in the manner required by the Act

and properly interpreted with the requisite "healthy regard for the federal policy favoring arbitration." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 626; Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, 460 U.S. at 24.

Since the court of appeal's interpretation of the choice-of-law clause in this case was clearly determinative of the issue of arbitrability (see JA 65), it was therefore directly subject to this federally imposed requirement that arbitration agreements be "generously construed" to promote the policy of the federal Act. The consequent necessity to employ this federal standard in assessing the ultimate correctness of that interpretation thus furnishes a second reason why the court of appeal's ruling on this issue is necessarily dependent upon and "interwoven" with an issue of federal law, and, as such, cannot constitute an "adequate and independent state ground" for the court's judgment.



2. The Court of Appeal's Interpretation of the Choice-of-Law Clause Is Not "Broad Enough to Sustain the Judgment," Because Even the Acceptance of That Interpretation Would Still Leave the Judgment Subject to Reversal on a Separate Federal Ground.
- 

In order to preclude review of a state-court decision by this Court, the state court's resolution of a question of state law must be, not only "independent," but also "adequate" in the sense of being "broad enough to sustain the judgment" without regard to the disposition of any accompanying federal question which the case may present. Enterprise Irrig. Dist. v. Farmers Mutual Canal Co., supra, 243 U.S. at 164. Accord, Xerox Corp. v. Harris County, supra, 459 U.S. at 149; Abie State Bank v. Bryan, supra, 282 U.S. at 773; Ward v. Love County, supra, 253 U.S. at 22-23; Murdock v. City of Memphis, supra, 20 Wall. (87 U.S.) at 636. If the judgment would be susceptible to reversal on federal grounds even if the state court's decision of the state-law issue were left undisturbed, the judgment will be found reviewable despite the lower court's reliance on state-law grounds for its decision. Xerox

Corp. v. Harris County, supra, 459 U.S. at 164;  
Abie State Bank v. Bryan, supra, 282 U.S. at  
773, 775-77; Murdock v. City of Memphis, supra,  
20 Wall. (87 U.S.) at 636.

The court of appeal's interpretation of the choice-of-law clause in this case cannot be viewed as "adequate," in this sense, to support its judgment, because, as the court itself acknowledged, Volt's challenge to the application of state law to this dispute extends beyond its disagreement with that interpretation to encompass an additional ground for federal preemption that is not dependent on the construction given to the choice-of-law clause (JA 68; see J.S. App. F, pp. 19-20). Volt contended in the lower courts, and contends here, that even if the court of appeal's interpretation of that clause were to be accepted in its entirety, it would not be effective to prevent preemption of state law because the clause, as so interpreted, would be rendered unenforceable on "public policy" grounds as a violation of the federal policy favoring the enforcement of arbitration

agreements (see J.S. Apps. E, pp. 7-8; F, pp. 19-20). A full demonstration of the substantive validity of this contention must await the argument on the merits. At this point, it is merely sufficient to note that the presence of this additional issue in this case clearly establishes that the court of appeal's interpretation of the choice-of-law clause is not "broad enough to sustain the judgment" without resolution of a separate question of federal law, and that it therefore cannot be treated as "an adequate and independent state ground" that would foreclose review of the judgment by this Court.

3. There Is No "Fair or Substantial Basis" for the Court of Appeal's Interpretation of the Choice-of-Law Clause.

---

Finally, it is also well settled that, in order to guard against arbitrary denials of federal claims, a further test of "adequacy" must be applied in determining whether a state court's ruling on an accompanying issue of state law presents an "adequate and independent state ground" for its judgment - namely, whether the ruling rests upon a "fair or

substantial basis," or whether, on the other hand, it is so "manifestly wrong" as to present an "unreasonable obstacle" to the protection of rights guaranteed by federal law. Demorest v. City Bank Farmers Trust Co., supra, 321 U.S. at 42; Hale v. Iowa State Board of Assessment, 302 U.S. 95, 101 (1938); Davis v. Wechsler, 263 U.S. 22, 24-25 (1923). Accord, James v. Kentucky, 466 U.S. 341, 348-49 (1984); Lawrence v. State Tax Comm., 286 U.S. 276, 282 (1932); Broad River Power Co. v. South Carolina, 281 U.S. 537, 540 (1930); Ancient Egyptian Order v. Michaux, 279 U.S. 737, 744-45 (1929); Ward v. Love County, supra, 253 U.S. at 22. Cf. Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100 (1938). See, generally 16 Wright et al., supra, §4026, pp. 731-32; §4029, pp. 750-51; §4030, p. 759.

The application of this standard to the ruling of the court of appeal in this case cannot be fully carried out in advance of the discussion of the merits of the case, since the question whether that ruling rests upon a "fair or substantial basis" is obviously intertwined

with the question of its substantive correctness. One aspect of this question, however, has already been touched upon in the earlier discussion, wherein it was shown that the court's ruling was not based upon any generally accepted principle of state law but instead merely embodied the court's own ipse dixit as to how the choice-of-law clause should be interpreted. Even at this point, therefore, it is possible to draw a tentative conclusion that the court's decision cannot be said to rest upon the sort of "firmly established and regularly followed state practice" without which a "fair or substantial basis" for a state court's decision will not normally be found to exist. James v. Kentucky, supra, 466 U.S. at 348-49. The remaining reasons why the court of appeal's ruling fails to satisfy this standard of adequacy will be developed in the argument on the merits. If that argument should show, as Volt is confident it will, that the court of appeal's construction of the choice-of-law clause is indeed "manifestly wrong," that conclusion will provide a final independently



sufficient reason why the court's resolution of this issue may not be accepted as an "adequate and independent state ground" for its judgment.

It was demonstrated at the outset of this discussion that the court of appeal's interpretation of the choice-of-law clause ultimately presents a federal question to which the doctrine of "adequate and independent state ground" has no application. It has now been shown that even if that interpretation should be viewed as based on state law, this doctrine will not insulate the court of appeal's judgment from review in any event, because the grounds for the judgment are neither "independent" nor "adequate" within the meaning that has been given to these terms in the decisions of this Court applying the doctrine. For all these reasons, it is clear that this jurisdictional limitation presents no obstacle to the Court's acceptance of jurisdiction to decide this appeal.

II. There Is No Serious Controversy That the Federal Arbitration Act Would Require Arbitration of the Parties' Present Dispute if the Choice-of-Law Clause in the Contract Were Not Interpreted to Foreclose the Application of the Act to This Case.

The Court's jurisdiction being thus assured, it is now appropriate to address the merits of the appeal. Before turning directly to an analysis of the principal issues presented by this case, however, it is first necessary to demonstrate that these issues are indeed dispositive of the outcome of this suit and hence squarely presented for decision on this appeal. This demonstration will involve nothing more than the brief statement of certain familiar propositions regarding the general applicability of the Federal Arbitration Act. Taken together, these propositions establish that, unless the choice-of-law clause in the parties' contract were found to dictate a different result, the federal Act would govern the disposition of the case and would require that Stanford be compelled to arbitrate its dispute with Volt, notwithstanding the conflicting dictates of the state statute that was relied upon by the courts

below to relieve Stanford of its obligation in this regard.

First of all, it is by now well settled that the Federal Arbitration Act creates a comprehensive body of substantive law governing all arbitrations arising out of transactions affecting interstate commerce, and that its provisions are therefore required to be enforced in state courts, as well as federal courts, to the exclusion of any conflicting provisions of state law. Perry v. Thomas, supra, 107 S.Ct. at 2525; Southland Corp. v. Keating, supra, 465 U.S. at 12; Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, 460 U.S. at 24. As this Court stated in the often quoted passage from its opinion in Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, the Act "create[s] a body of federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of the Act," which "governs that issue in either state or federal court ... notwithstanding any state substantive or procedural policies to the contrary." Id., 460 U.S. at 24.

7

Secondly, it is equally clear that if the federal Act were to be applied to this case, its application would necessarily mandate judicial enforcement of Stanford's agreement to arbitrate its dispute with Volt, and would thus require reversal of the decisions of the courts below denying Volt's petition for that relief. As noted earlier, and as the court of appeal's opinion makes clear, the sole basis for those decisions was the provision of section 1281.2(c) of the California Code of Civil Procedure that authorizes denial of a petition to compel arbitration where related non-arbitrable claims have been asserted against third parties in a pending lawsuit. The Federal Arbitration Act contains no counterpart provision permitting avoidance of an arbitration agreement in these circumstances, and the decisions of the state and federal courts applying the Act have therefore unanimously held that the existence of such non-arbitrable third-party claims does not afford a proper ground for denying or staying the enforcement of such an agreement. Moses H. Cone Mem. Hosp.

v. Mercury Constr. Co., supra, 460 U.S. at 19-20; C.Itoh & Co. v. Jordan Intl. Co., 552 F.2d 1228, 1231 (7th Cir. 1977); Acevedo Maldonado v. PPG Industries, Inc., 514 F.2d 614, 617 (1st Cir. 1975); Hamilton Life Ins. Co. v. Republic Natl. Life Ins. Co., 408 F.2d 606, 609 (2d Cir. 1969); Hilti, Inc. v. Oldach, 392 F.2d 368, 369n.2 (1st Cir. 1968); Liddington v. The Energy Group, Inc., 238 Cal.Rptr. 202, 207 (Cal.App. 1987); R.J. Palmer Constr. Co. v. Wichita Band Instr. Co., 642 P.2d 127, 131 (Kan.App. 1982); Episcopal Housing Corp. v. Federal Ins. Co., 239 S.E.2d 647, 652 (S.C. 1977). Cf. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218-21 (1985) (arbitration compelled despite "intertwining" of arbitrable and non-arbitrable claims). If applied in this case, this settled federal rule would clearly preempt the directly conflicting prescriptions of section 1281.2(c) and hence eliminate the only legal basis for the denial of Volt's petition. As the court of appeal itself acknowledged, it is thus "apparent that were the federal rules to apply, Volt's petition to



compel arbitration would have to be granted" (JA 65).

Finally, there is no question that, unless otherwise dictated by the choice-of-law clause, federal law would indeed govern the disposition of this case, because the arbitration agreement at issue here clearly "evidenc[es] a transaction involving ... commerce among the several states" within the meaning of the provisions of the federal Act defining the scope of its coverage. 9 U.S.C. §§1-2. Volt established by uncontradicted evidence in the trial court that a large proportion of its manpower and equipment was transferred or shipped to California from other states for use on the Stanford project, and that the project was administered from Volt's offices outside California (JA 55-56). Under the standards enunciated in the case law on this issue, these facts clearly establish a sufficient nexus with interstate commerce to bring this transaction well within the purview of the federal Act. Prima Paint Co. v. Flood & Conklin, 388 U.S. 395, 401 (1967); Del E. Webb Const. Co. v. Richardson

Hosp. Auth., 823 F.2d 145, 147-48 (5th Cir. 1987); In re Mercury Constr. Corp., 656 F.2d 933, 942 (4th Cir. 1981), affd. sub nom. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, 460 U.S. 1 (1983); Pathman Const. Co. v. Knox Cty. Hosp. Assn., 326 N.E.2d 844, 848-51 (Ind.App. 1975); Episcopal Housing Corp. v. Federal Ins. Co., supra, 239 S.E.2d at 650-52.

All of these settled propositions were apparently accepted by the court of appeal, and in fact have never been seriously contested by Stanford itself.\* It follows that the only remaining issue standing in the way of a

---

\* This description of Stanford's position must be qualified in one minor respect. In its brief in the court of appeal, Stanford attempted, somewhat obliquely, to cast some doubt on the general applicability of the remedial provisions of the federal Act in state courts by pointing to an admittedly somewhat puzzling footnote in the opinion of this Court in Southland Corp. v. Keating, supra, 465 U.S. 1, where the Court, in the course of responding to one of the points made by the dissenting justice, had suggested that the sections of the Act specifying the methods for enforcing arbitration agreements might not be specifically applicable in state trial courts (Stanford's Brief filed in the court below April 6, 1987, pp. 12-13, citing Southland, supra, 465 U.S. at 16n.10). In its reply brief, Volt responded to this argument by demonstrating at considerable length (contd.)

determination that the state statute relied upon by the courts below was indeed preempted by the Federal Arbitration Act, and that Volt's petition to compel arbitration pursuant to the Act should therefore have been granted, is the question whether the application of the federal Act to this case is precluded by the choice-of-law clause in the parties' agreement. That question, in turn, resolves itself into two

---

(footnote contd.) that the actual holdings of this Court, including the holding in Southland itself, as well as the decisions of many state and lower federal courts on the issue, had clearly established that the remedies and procedures prescribed by the federal Act, whether by virtue of these particular sections or otherwise, were enforceable in state courts as well as in federal courts (Volt's Reply Brief, filed May 22, 1987, pp. 15-34). This entire debate was ultimately mooted by another decision of this Court handed down after the filing of the briefs but before the oral argument in the court of appeal. In that decision, Perry v. Thomas, supra, 107 S.Ct. 2520, the Court effectively held, by specifically enforcing a petition to compel arbitration brought in a California superior court under the very sections of the Act referred to in the Southland footnote, that these procedural provisions of the federal Act were indeed fully applicable in state courts. Id., 107 S.Ct. at 2523 and n.1. As the court of appeal apparently assumed in its opinion in this case, this intervening decision of this Court has effectively eliminated any serious possibility of further controversy over this point.

further questions - namely, (1) whether the terms of the choice-of-law clause may properly be interpreted to have this preclusive effect, and (2), if so, whether the clause may be validly enforced consistently with the federal public policy favoring the arbitration of private disputes. These two questions are the subjects of the remainder of this brief.

III. For No Less Than Six Independently Sufficient Reasons, The Choice-of-Law Clause Must Be Interpreted to Permit, Indeed to Require, Application of the Federal Arbitration Act to This Transaction.

A. To Interpret a Choice-of-Law Clause as Foreclosing the Application of Federal Law Is Discordant with the Common Understanding of the Function of Such Clauses.

The first of many reasons why the choice-of-law clause in the Volt-Stanford contract may not be interpreted to preclude application of federal law to this case is that such an interpretation initially embodies an altogether anomalous conception of the scope of "choice of law" in general and the function of choice-of-law clauses in particular. Neither the Restatement of Conflict of Laws nor most of the hornbooks on this subject purport to cover the



topic of federal supremacy or the problem of conflicts or choices between federal and state law. E.g., Restatement, Conflict of Laws (2d) (1971); Ehrenzweig, Conflict of Laws (1962); Siegel, Conflicts (1982).<sup>\*</sup> Rather, these commentaries are primarily occupied with analyses of the issues presented by conflicts between the laws of the different states and of other coequal sovereigns. Id. What is true of these commentaries in general is also true of the particular sections therein that are specifically addressed to the treatment of contractual choice-of-law provisions, none of which discusses issues of federal preemption or conflicts between state and federal laws. Restatement, supra, §§187, 203; Ehrenzweig, supra at 455-58; Siegel, supra at 211-15. The implication is clear that the common

---

<sup>\*</sup> For example, the only reference to this type of problem that appears in the Restatement consists of a general comment to the effect that the Supremacy Clause may "limit the power of the States" in applying their choice-of-law rules. Restatement, supra, §2, comment b. Beyond this, the Restatement expressly provides that the relations between state and federal law "are not dealt with in the Restatement of this subject." Id., §3, comment c.



understanding of the coverage of this subject and of the function of these kinds of clauses simply does not encompass federal-state relations or the resolution of conflicts between state law and the preemptive provisions of federal law.

Even more graphic evidence of this common perception is provided by the apparently very substantial proportion of the cases involving both contractual choice-of-law provisions and issues of federal supremacy in which both the courts and the litigants have simply failed to notice any connection between these two subjects. In a later section of this brief, Volt will describe the entire body of case law holding, with virtual unanimity, that a choice-of-law clause may not be applied to foreclose the application of the Federal Arbitration Act. What is noteworthy for present purposes, however, is that a remarkably large number of these decisions, in fact a near majority, have reached this result sub silentio, by simply proceeding to resolve the issue of the applicability of the federal Act without

reference to the choice-of-law provision and without revealing any awareness whatever that such a provision might have any bearing at all upon this issue. E.g., Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956); Del E. Webb Constr. Co. v. Richardson Hosp. Auth., 823 F.2d 145 (5th Cir. 1987) (involved AIA Document A201, containing the same choice-of-law clause as the one at issue here); Wasy1, Inc. v. First Boston Corp., 813 F.2d 1579 (9th Cir. 1987); LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791 F.2d 1334 (9th Cir. 1986); Hilti, Inc. v. Oldach, supra, 392 F.2d 368; Ford v. Shearson Lehman Amer. Express Co., 225 Cal.Rptr. 895 (Cal.App. 1986); ADC Constr. Co. v. McDaniel Grading, Inc., supra, 338 S.E.2d 733 (AIA Document A201); Atlantic Painting & Contracting, Inc. v. Nashville Bridge Co., 670 S.W.2d 841 (Ky. 1984); Pinkis v. Network Cinema Corp., 512 P.2d 751 (Wash. App. 1973). See also Collins Radio Co. v. Ex-Cell-O Corp., 467 F.2d 995, 997 (8th Cir. 1972) (opining that federal law should apply despite

choice-of-law clause without stating any rationale for this conclusion); TAC Travel Amer. Corp. v. World Airways, Inc., 443 F.Supp. 825, 827 (S.D.N.Y. 1978) (semble); Liddington v. The Energy Group, 238 Cal.Rptr. 202 (Cal. App. 1987) (semble). If these cases arising under the Arbitration Act may be taken as a fair sample, it must be concluded that the case law fully substantiates the observation that the idea of treating a choice-of-law clause as dispositive of an issue of federal preemption is quite foreign to the normal perception of a good many courts and counsel.

As the preceding citation indicates, two of the decisions exemplifying this point are decisions of this Court. Thus, in Scherk v. Alberto-Culver Co., supra, 417 U.S. 506, the Court applied the Federal Arbitration Act to compel arbitration of a dispute involving alleged securities violations committed during the performance of a contract that specified that it should be governed by "the laws of the State of Illinois." Id., 417 U.S. at 508. Although the Court referred to this clause in

another connection in its opinion (id. at 519n.13), it failed to ascribe any significance to the clause in the course of its consideration of the applicability of either the Arbitration Act or the federal securities laws. Id., 417 U.S. at 510-12, 519-20. Similarly, in Bernhardt v. Polygraphic Co., supra, 350 U.S. 198, where the contract provided that it should be governed by the laws of the State of New York, the Court based its decision that the Federal Arbitration Act was inapplicable to the case solely on the ground of an absence of interstate commerce, and mentioned the choice-of-law clause only in connection with its possible relevance to the resolution of a conflict between New York law and the law of Vermont. Id., 350 U.S. at 200-2, 205; see the opinion below, 218 F.2d at 949-50.\*

---

\* This Court also applied the Federal Arbitration Act without considering the bearing of a choice-of-law clause on the applicability of the Act in its recent decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. 614. However, since the clause in that case designated the law of a foreign nation rather than an American state as the governing law, the decision is not directly relevant to the present discussion. (contd.)

Thus, the decisions of this Court, as well as the decisions of numerous lower courts and the contents of both the Restatement and the standard treatises on the subject, amply illustrate that choice-of-law clauses are typically perceived as relevant only to conflicts between the laws of different states, and are not customarily viewed as encompassing preemption problems or as purporting to resolve

---

(footnote contd.) Id., 473 U.S. at 637n.19. More to the point in this context is the decision of the Court in United States v. Kimbell Foods, Inc., supra, 440 U.S. 715, which, though it did not involve the Arbitration Act, furnishes another example of the Court's apparent assumption that a choice-of-law clause should not normally be viewed as pertinent to an issue of federal preemption. The parties' contract in that case contained a clause expressly designating "the laws of the State of Texas" as the governing law (see the opinion below, 557 F.2d at 498n.8), but the Court nevertheless proceeded to address and resolve a difficult preemption issue without even mentioning the existence of this contractual provision, let alone the possibility that it might have a bearing on this issue. Id. The only case in which the Court has ever expressly considered the relevance of a choice-of-law clause to an issue of federal preemption is Fidelity Federal S. & L. Assn. v. de la Cuesta, supra, 458 U.S. 141, where the Court flatly rejected the suggestion that the application of federal law might be foreclosed by such a provision. Id., 458 U.S. at 157n.12. This decision will be more fully discussed below.



conflicts between state and federal law. Admittedly, the fact that these provisions are not normally regarded as serving this latter purpose does not, in and of itself, establish that the specific choice-of-law clause at issue here might not be found to fulfill that function in this case. This fact does suggest, however, that such a finding would run counter to the accepted usage of these clauses, and that it could therefore be justified only by reasonably clear evidence that such an unusual result was actually contemplated by the parties. In the ensuing discussion, Volt will demonstrate that neither the language of the contract nor the available evidence of the parties' intent even remotely approaches justifying such a finding. Indeed, it will be shown that the record compels the precisely contrary conclusion - that is, that the choice-of-law clause in this agreement was specifically intended not to encompass any issue of federal preemption or to foreclose the application of otherwise applicable federal laws to this transaction.

**B. The Literal Terms of the Parties' Contract  
Refute the Contention That It Was Intended  
to Preclude the Application of Federal Law  
to This Transaction.**

---

At the risk of belaboring the obvious, it is important to note at the outset that the choice-of-law clause at issue here does not contain any express language indicating that the contract shall be governed exclusively by the state law of California. Indeed, it does not even expressly refer to the law of California, or even to the law of the "state" where the transaction is to be performed. Instead it simply provides that "The Contract shall be governed by the law of the place where the project is located" (JA 37). Insofar as this case turns on strict interpretation of the contractual language, therefore, the question to be resolved is whether the phrase "law of the place where the project is located" somehow conveys an unstated implication that the transaction should be governed solely by state law to the exclusion of otherwise applicable federal statutes. As will now be shown, the answer to this question is emphatically negative.

The term, "place where the project is located," literally refers, not only to the State of California, but also to the City of Palo Alto, the County of Santa Clara, and the nation of the United States of America. All of these political entities have laws and ordinances that are applicable in one way or another at the "place" where this project was performed. The only literally correct interpretation of the phrase "law of the place where the project is located," therefore, is that it constitutes a collective reference to the laws of all of these entities within whose boundaries the project was in fact situated. Under that interpretation, the phrase would clearly encompass all laws of the federal government that would otherwise apply to any of the activities occurring during the course of the project. Thus, on its face, the operative contractual language not only does not preclude, but instead clearly seems to require, the application of federal law to this transaction.

This conclusion is reinforced by an

examination of the terms of the contract as a whole, which likewise clearly imply an intention that federal law was meant to apply to this project. To take but the most obvious examples, two of the other sections of the contract require the contractor to "pay all sales, consumer, use and other similar taxes" applicable to his work, and to "comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority bearing on the safety of persons or property" at the project site (JA 37, 39). It is inconceivable that these provisions were intended to compel the contractor's compliance only with laws enacted at the state level and to leave him free to ignore all taxes and safety regulations, such as the rules of federal OSHA, that have been promulgated by the federal government and are otherwise clearly applicable to this type of project. Yet this would be precisely the result of interpreting the choice-of-law clause as precluding the application of federal law to the interpretation and performance of this contract.

It follows that the contract must be construed as incorporating federal law among the laws applicable to this transaction, not only by virtue of the literal command of the choice-of-law provision itself, but also to ensure a consistent and sensible construction of the entirety of the parties' agreement.

C. As This Court Held with Regard to a Virtually Identical Provision in the de la Cuesta Case, the Basic Tenets of Federalism Likewise Dictate That the Term "Law of the Place Where the Project Is Located" Must Be Construed to Encompass Federal as Well as State Law.

The conclusion that federal law necessarily falls within the compass of the phrase "law of the place where the project is located" is also dictated by a consideration of the basic tenets of American federalism. It is a rudimentary precept of our constitutional system that federal law constitutes an integral part of the law of every state and of every "place" within the federal union. This fundamental idea is as old as the Constitution itself and has been reaffirmed many times in the opinions of this Court. The Federalist, Nos. 16, 27; Fidelity Federal S. & L. Assn. v. de la Cuesta, supra,



458 U.S. at 157; Testa v. Katt, 330 U.S. 386, 392-93 (1947); Mondou v. New York, N.H. & Hartford R.R. Co. (Second Employers Liability Act Cases), 223 U.S. 1, 57-58 (1912); Hauenstein v. Lynham, 100 U.S. 483, 490 (1880); Claflin v. Houseman, 93 U.S. 130, 136-37 (1876). One of the most perspicuous statements of this elementary doctrine of federalism was provided more than a hundred years ago by Mr. Justice Bradley in his opinion for a unanimous Court in Claflin v. Houseman, supra, where he said (id., 93 U.S. at 136-37):

"The laws of the United States are laws of the several States, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the State; concurrent as to place and persons, though distinct as to subject matter."

To the same general effect is the later statement of Mr. Justice Swayne in his opinion, also for a unanimous Court, in Hauenstein v. Lynham, supra, 100 U.S. 483, where he observed that "the Constitution, laws and treaties of the United States are as much a part of the law of

every state as its own local laws and Constitution." Id., 100 U.S. at 490.

If the literal language of the choice-of-law provision in the present contract were not itself sufficient to compel this result, this settled constitutional principle would plainly require that the phrase "law of the place where the project is located" be construed to encompass the application of federal law to this project. Given the fact that the project was, after all, "located" within the boundaries of one of the states of the United States, the only way that federal law could be excluded from the scope of the operative contractual term would be to conclude that federal law is not in fact a part of "the law of" that state or that "place." Under the principle just described, such a conclusion is inadmissible as a matter of basic constitutional law. The very nature of our constitutional system, as well as the language of the contract, thus compels a construction of the choice-of-law clause that would encompass the application of federal law to this transaction.

This very analysis of this issue was in fact recently applied by this Court to justify precisely this interpretation of a nearly identical choice-of-law clause in its decision in Fidelity Federal S. & L. Assn. v. de la Cuesta, supra, 458 U.S. 141. That decision, as noted earlier, sustained a preemption challenge to a rule of California law invalidating "due on sale" clauses in certain mortgages issued by federally chartered lending institutions. One of the arguments that had been offered in defense of the state rule and accepted by the state courts was a contention that federal law was itself rendered inapplicable to these mortgages by a choice-of-law clause in the mortgages which specified that their application should be "governed by the law of the jurisdiction in which the property is located." Id., 458 U.S. at 148, 150-51. The Court disposed of that argument in a footnote to a passage of its opinion in which it had reaffirmed, quoting from the opinion in Hauenstein v. Lynham, supra, the fundamental principle that federal law is "'as much a part

of the law of every state as its own local laws and Constitution.'" Id. at 157. In that footnote, the Court stated (id. at 157n.12):

"This principle likewise leads us to reject appellees' contention that, with respect to the two deeds of trust containing ¶15 [the choice-of-law provision], appellants did in fact agree to be bound by local law. Paragraph 15 provides that the deed is to be governed by the 'law of the jurisdiction' in which the property is located; but the 'law of the jurisdiction' includes federal as well as state law."

This Court itself has thus expressly confirmed the conclusion that a choice-of-law clause of the kind at issue here, whatever interpretation of its literal terms might have been adopted by the state courts, simply cannot be construed as excluding the operation of otherwise applicable federal laws without offending the most basic principles of our federal scheme of government.

D. The Only Evidence in the Record Regarding the Intent of the Parties Suggests That the Federal Arbitration Act Was Intended to Govern the Resolution of Disputes Arising Under the Contract.

Notwithstanding all of the foregoing considerations, an argument might still be constructed that the choice-of-law clause might be susceptible to the interpretation placed upon it by the court of appeal if it clearly

appeared from the evidence that such an otherwise bizarre and unacceptable interpretation was actually contemplated by the parties at the time they entered into the contract. Indeed, the opinion of the lower court, by its repeated assertions that the parties "chose" to be governed exclusively by California law (JA 66, 72, 76), seems to intimate that the court somehow managed to divine such an underlying intention of the parties. In fact, however, even assuming arguendo that proof of such intent would be permitted to override the plain meaning of the contractual language, any such possibility is foreclosed in this case by the total absence of any such proof in the record. In fact, as will now be shown, what little evidence exists on this subject suggests, if anything, that the parties' intention, at least with respect to the specific issue of arbitrability that is presented by this case, was precisely the opposite of the one attributed to them by the court of appeal.

The court of appeal itself acknowledges in its opinion that neither party presented any



direct evidence of the intent that underlay the adoption of the choice-of-law clause (JA 66). Indeed, since the personnel who executed the contract were business executives and not lawyers (JA 33), it may fairly be presumed that they had no clear idea of the potential significance of their adoption of this clause, either in general or with respect to the specific issue of the enforceability of the contract's arbitration clause that has now arisen in this case.

The circumstances do suggest, however, that Stanford at least was quite aware of the terms and requirements of the arbitration clause itself, since, as indicated in the Statement of the Case, this clause was prepared by Stanford as a substitute for the standard-form clause ordinarily used with this form of agreement (JA 40). As was also noted above, the adoption of this provision reflected a clear awareness on Stanford's part of the possibility of simultaneous disputes with the several participants in the project and the consequent problem of duplicative litigation (id.; compare JA 37-38).

Stanford could easily have dealt with this problem by inserting a proviso expressly excusing it from its duty to arbitrate in the event of such disputes with non-parties to the agreement. See e.g., Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., supra, 191 Cal.Rptr. at 17. It deliberately chose not to do this, however, and instead adopted a provision that expressly preserved its duty to arbitrate notwithstanding the pendency of such third-party disputes, subject only to the possibility that Volt might be required to consolidate the arbitration of its claim with other pending arbitrations arising out of the transaction (JA 40).

Thus, to the extent the evidence indicates anything about the parties' intent, it shows that Stanford fully intended to proceed with arbitration of its dispute with Volt despite the problem posed by the existence of potential claims against other parties. Since this is precisely the result that would be mandated by federal law and frustrated by the application of state law to the present dispute, this

evidence, if anything, ultimately supports the conclusion that federal law should govern this controversy. At all events, it clearly forecloses any argument that the court of appeal's aberrant reading of the choice-of-law clause might somehow be justified on the basis of some notion that the parties consciously intended or "chose" to forbid the application of federal law to the resolution of disputes arising under their agreement.

E. The Overwhelming Weight of Authority, Both in This Court and in the Lower Courts, Supports the Conclusion That a Choice-of-Law Provision of the Kind at Issue Here Does Not Affect the Application of Federal Law to the Parties' Transaction.

---

The court of appeal's construction of the choice-of-law clause contravenes, not only the language of the contract, the evidence of the parties' intent, and the basic principles of federalism, but also the overwhelming weight of the prior decisional law on this issue. The decisions of this Court on the issue have already been described above. As was there shown, the Court has squarely held, in its decision in Fidelity Federal S. & L. Assn. v. de la Cuesta, supra, 458 U.S. 141, that a

virtually identical choice-of-law provision could not be construed to foreclose the application of otherwise applicable federal law or to shield conflicting state laws from federal preemption. As was also noted above, the Court has reached this same result sub silentio on two other occasions by simply disregarding the effect of similar choice-of-law provisions in the course of determining the applicability of the Federal Arbitration Act to the parties' transactions. Scherk v. Alberto Culver Co., supra, 417 U.S. 506; Bernhardt v. Polygraphic Co., supra, 350 U.S. 198.

The decisions of the lower courts likewise overwhelmingly reject the notion that the application of the Arbitration Act may be precluded by a choice-of-law clause in the parties' contract. These courts have justified their decisions to this effect by a variety of alternative rationales, which generally correspond to the various reasons for this result that have been offered in the earlier discussion. Thus, some courts, addressing contractual provisions identical to the one at

issue here, have simply held that the words, "law of the place where the project is located," literally encompass federal as well as state law. Episcopal Housing Corp. v. Federal Ins. Co., 239 S.E.2d 647, 650n.1 (S.C. 1977). See also Huber, Hunt & Nichols v. Architectural Stone Co., 625 F.2d 22, 25n.8 (5th Cir. 1980). Certain other decisions, involving choice-of-law clauses designating the law of a particular named state, have relied on the reasoning later adopted by this Court in its opinion in the de la Cuesta case, supra, to the effect that any reference to the law of a state of the United States must be deemed to include federal law. Burke County Public Schools v. The Shaver P'ship., 279 S.E.2d 816, 823, 825 (N.C. 1981); Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634, 637 (Tex.Civ.App. 1973). See also Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1270 (7th Cir. 1976) (quoting Mamlin, supra); Tennessee River Pulp & Paper Co. v. Eichleay Corp., 637 S.W.2d 853, 857 (Tenn. 1982) (citing Mamlin). A third, much larger group of decisions, as noted above,



have implicitly expressed the general perception that choice-of-law clauses are not even relevant to the applicability of federal law, by simply proceeding to apply the Federal Arbitration Act in the face of such a clause without even bothering to state reasons for their holdings to this effect. E.g., Del E. Webb Constr. Co. v. Richardson Hosp. Auth., supra, 823 F.2d 145 (involved AIA Document A201, containing the same choice-of-law clause as the one at issue here); Wasy1, Inc. v. First Boston Corp., supra, 813 F.2d 1579; LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., supra, 791 F.2d 1334; Collins Radio Co. v. Ex-Cell-C Corp., supra, 467 F.2d 995; Hilti, Inc. v. Oldach, supra, 392 F.2d 368; TAC Travel Amer. Corp. v. World Airways, Inc., supra, 443 F.Supp. 825; Liddington v. The Energy Group, Inc., supra, 238 Cal.Rptr. 238; Ford v. Shearson Lehman Amer. Express Co., supra, 225 Cal.Rptr. 895; ADC Constr. Co. v. McDaniel Grading, Inc., supra, 338 S.E.2d 733 (AIA Document A201); Atlantic Painting & Contracting, Inc. v. Nashville Bridge Co.,

supra, 670 S.W.2d 841; Pinkis v. Network Cinema Corp., supra, 512 P.2d 751. Finally, a number of decisions have held that, regardless of whether a choice-of-law provision might be interpreted as excluding federal law, it could not be applied to accomplish that result where this would prevent enforcement of the parties' arbitration agreement, because such an outcome would offend the basic policy of the federal Act favoring the arbitration of private disputes.\* Commonwealth Edison Co. v. Gulf Oil Corp., supra, 541 F.2d at 1269; Paul Allison, Inc. v. Minikin Storage, Inc., 486 F.Supp. 1, 3 (D.Neb. 1979); State ex rel. St. Joseph Light & Power Co. v. Donelson, 631 S.W.2d 887, 891-92 (Mo.App. 1982). See also Mesa Operating Ltd. P'ship. v. Intrastate Gas Comm., 797 F.2d 238, 243-44 (5th Cir. 1986) (relying on Commonwealth

---

\* This latter rationale for applying federal law despite the parties' adoption of a choice-of-law clause will be discussed in more detail in a later section of the brief, where Volt will demonstrate that even if the court of appeal's interpretation of the clause at issue here should be accepted, it would not foreclose the application of federal law because the result of that interpretation would simply be to render the clause invalid.

Edison, supra); Huber, Hunt & Nichols, Inc. v. Architectural Stone Corp., supra, 625 F.2d at 25n.8 (semble); Cone Mills Corp. v. August F. Nielsen Co., 455 N.Y.S.2d 625, 627 (N.Y.Sup.Ct. 1982) (semble).

Arrayed against this imposing panoply of three decisions of this Court and more than twenty decisions of the lower federal and state courts rejecting the result reached by the court of appeal in this case is a meager minority of only two contrary decisions,\* which have held, like the court of appeal, that the inclusion of a choice-of-law clause in the parties' contract effectively forecloses reliance on the Federal Arbitration Act and

---

\* Besides the two cases mentioned here, the opinion of the court of appeal cites two additional decisions as support for its holding on this issue (JA 67, citing Eric A. Carlstrom Const. Co. v. Independent School Dist. No. 77, 256 N.W.2d 479 (Minn. 1977), and Lane-Tahoe, Inc. v. Kindred Const. Co., 536 P.2d 491 (Nev. 1975)). With due respect to the court of appeal, the fact is that neither of these latter decisions has any bearing whatever on this issue. In both cases, the choice-of-law clause was referred to only as a basis for selecting between the laws of different states. The possible application of federal law to the issue of arbitrability was not even raised or considered by the court in either case.

requires resolution of the issue of arbitrability in exclusive accordance with state law. Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., supra, 191 Cal.Rptr. at 18; Standard Co. of New Orleans v. Elliott Const. Co., supra, 363 So.2d at 677. Besides their extreme minority status, both of these decisions are distinguishable from this case in any event, since the application of state law in each case ultimately resulted in enforcement of the parties' arbitration agreement to the same extent that it would have been enforceable under federal law. Garden Grove, supra at 23; Standard Co., supra at 676-77. Thus, in the end, it must be concluded that the court of appeal's decision, besides being wrong from every other point of view, is essentially devoid of authoritative support and indeed flatly contrary to established precedent.\*

---

\* For purposes of assessing whether the court of appeal's holding rests upon a "fair or substantial basis" for jurisdictional purposes, it is also worth noting that its decision appears to contravene, not only the general law, but also the law of California on the issue it addresses. Although the decision admittedly derives some support (continued)

F. At All Events, Any Ambiguity That Might Exist in the Terms of the Choice-of-Law Clause Would Have to Be Resolved in Favor of the Application of Federal Law, Pursuant to the Settled Federal Rule That Arbitration Agreements Must Be "Generously Construed" to Promote "the Federal Policy Favoring Arbitration."

---

Even if one were to disregard all of what has been said above and return to the literal words of the choice-of-law clause as if to a tabula rasa, the most that could be offered by way of an argument in defense of the court of appeal's interpretation of that clause is that

---

(footnote contd.) from the similar, though distinguishable, holding of the California court of appeal in Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., supra, 191 Cal.Rptr. 15, it is also flatly contradicted by the more recent decisions of two other California appellate courts, one of which squarely holds, albeit without extended discussion, that a choice-of-law clause does not preclude application of the Federal Arbitration Act, and the other of which reaches this same result sub silentio. Liddington v. The Energy Group, supra, 238 Cal.Rptr. at 204, 207; Ford v. Shearson Lehman Amer. Express Co., supra, 225 Cal.Rptr. at 896, 897. The California Supreme Court itself has never specifically addressed this issue, except insofar as it may be considered to have done so by disapproving the publication of the court of appeal's opinion in this case (JA 87). It has, however, wholeheartedly embraced, on several occasions, the general principle that "[t]he legislation of Congress is a portion of the law of each state." Miller v. Municipal Court, 142 P.2d 297, 314-15 (Cal. 1943). Accord Gerry (contd.)



the phrase "law of the place where the project is located" might be characterized as ambiguous with respect to its inclusion of federal law. In that event, one would need to resort either to extrinsic evidence of the parties' intent or to some preferential rule of construction in order to resolve the ambiguity. As the court of appeal has itself acknowledged (JA 66), there is no extrinsic evidence of intent, other than the evidence referred to above generally indicating that the parties intended their arbitration agreement to be enforced despite the pendency of litigation with third parties. There is, however, a very compelling rule of construction, derived from the policy of the Federal Arbitration Act itself, which would

---

(footnote contd.) of California v. Superior Court, 194 P.2d 689, 692 (Cal. 1948); Estate of Lindquist, 154 P.2d 879, 883 (Cal. 1944); Leet v. Union Pacific R.R. Co., 155 P.2d 42, 46 (Cal. 1944). It is difficult to imagine that a court having espoused this principle could bring itself to acquiesce in the court of appeal's misguided conclusion that a contractual reference to "the law of the place where the project is located" must be construed to exclude otherwise applicable federal law with respect to a project located in the state of California.

readily serve to resolve this ambiguity, and which, as will now be shown, would require that it be resolved in favor of the application of federal law to this dispute.

The rule of construction referred to is the rule laid down by this Court, in its several recent decisions applying the Arbitration Act, to the effect that any ambiguities in arbitration agreements within the coverage of the Act should generally be resolved in such a way as to favor arbitration of the parties' dispute. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 626; Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, 460 U.S. at 24-25. See Perry v. Thomas, supra, 107 S.Ct. at 2525; Southland Corp. v. Keating, supra, 465 U.S. at 10. This rule has already been described at some length above. As was there noted, the rule requires that all such agreements be "generously construed" in a manner reflecting "a healthy regard for the federal policy favoring arbitration," and that any doubt regarding the enforceability of the agreement

"should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 626; Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, 460 U.S. at 24-25.

Application of this rule of interpretation to the contractual provision at issue in this case would plainly dictate that any ambiguity in the phrase "law of the place where the project is located" be resolved in favor of the inclusion of federal law within the scope of that provision, because only federal law would permit enforcement of the parties' agreement to arbitrate their present dispute and thus satisfy "the federal policy favoring arbitration." Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, 460 U.S. at 24. This settled rule thus furnishes a final conclusive reason for requiring this result, which would be sufficient in itself to compel reversal of the court of appeal's contrary ruling on this issue even

apart from the several additional reasons supporting that outcome that have been adduced in the course of the preceding discussion.

IV. Even if the Court of Appeal's Interpretation of the Choice-of-Law Clause Were to Be Accepted, the Application of Federal Law to This Transaction Would Still Be Required, Because That Interpretation Would Render the Clause Unenforceable as a Violation of Federal Public Policy.

A. The Principle Is Well Established in All Courts, Including This One, That a Choice-of-Law Clause Will Not Be Enforced Where Its Enforcement Would Lead to a Violation of a Fundamental Public Policy of the Jurisdiction Whose Law Would Otherwise Apply to the Transaction.

In the earlier discussion, it was noted that a number of lower federal and state courts have ruled that any choice-of-law clause that might be interpreted to foreclose reliance on the Federal Arbitration Act should be held invalid if it would thereby prevent enforcement of the parties' arbitration agreement, because this result would contravene the federal policy favoring the arbitration of private disputes. Commonwealth Edison Co. v. Gulf Oil Corp., supra, 541 F.2d at 1269; Paul Allison, Inc. v. Minikin Storage, Inc., supra, 486 F.Supp. at 3; State ex rel. St. Joseph Light & Power Co. v.

Donelson, supra, 631 S.W.2d at 891-92. See also Mesa Operating Ltd. P'ship. v. Intrastate Gas Comm., supra, 797 F.2d at 243-44 (citing Commonwealth Edison, supra); Huber, Hunt & Nichols, Inc. v. Architectural Stone Corp., supra, 625 F.2d at 25n.8 (semble); Cone Mills Corp. v. August F. Nielsen Co., supra, 455 N.Y.S.2d at 627 (semble). Although the opinions in most of these cases have not enunciated any fundamental basis for their rulings to this effect other than the federal policy itself, a deeper rationale for the rule espoused in these decisions can readily be found in an established common-law principle governing the general validity of choice-of-law clauses that has been adopted by the courts of all jurisdictions, including this Court.

It is well settled that a contractual choice-of-law provision will not generally be applied where its application would require resort to a rule of substantive law that would violate a fundamental public policy of the jurisdiction whose law would otherwise apply to the transaction. E.g., The Kensington, 183



U.S. 263, 268-70 (1902); Barnes Group, Inc. v. C & C Products, Inc., 716 F.2d 1023, 1028-30 (4th Cir. 1983); FDIC v. Bank of America, 701 F.2d 831, 834-35 (9th Cir. 1983), cert. den. 464 U.S. 935 (1983); Keystone Leasing Corp. v. People's Protective Life Ins. Co., 514 F.Supp. 841, 847-48 (E.D.N.Y. 1981); Hall v. Superior Court, 197 Cal.Rptr. 757, 761 (Cal.App. 1983); Temporarily Yours-Temporary Help Services, Inc. v. Manpower, Inc., 377 So.2d 825, 827 (Fla.App. 1979); Kronovet v. Lipchin, 415 A.2d 1096, 1106 (Md. 1980); State ex rel. Geil v. Corcoran, 623 S.W.2d 557, 559-60 (Mo.App. 1981); Restatement (2d), Conflict of Laws §187(2)(b) and comment g. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., *supra*, 473 U.S. at 637n.19. In recent years, under the influence of the Restatement and certain commentators, this settled rule has been further refined by taking into account, as an additional factor bearing upon the enforceability of such a provision, the question whether its application would also have the effect of nullifying one of the obligations imposed by the parties' agree-

ment. Bense v. Interstate Battery System, Inc., 683 F.2d 718, 722 (2d Cir. 1982); Kronovet v. Lipchin, supra, 415 A.2d at 1105n.18; State ex rel. St. Joseph Light & Power Co. v. Donelson, supra, 631 S.W.2d at 891-92; Restatement, supra, §187, comment e; Weintraub, Commentary on the Conflict of Laws 373-74 (3d ed. 1986). See Commonwealth Edison Co. v. Gulf Oil Corp., supra, 541 F.2d at 1269.

This established principle was initially adopted by this Court as a rule of federal law in its decision in The Kensington, supra, 183 U.S. 263, where the Court relied upon the rule to decline enforcement of a choice-of-law provision specifying the application of Belgian law to a transatlantic baggage contract between two American citizens. Finding that it would effectively foreclose reliance on established rules of federal law governing the liability of common carriers, the Court held that enforcement of this choice-of-law provision should be refused on the ground that this would result in a "violation of the public policy of the United States." Id., 183 U.S. at 269.

The enduring viability of the rule adopted in The Kensington was most recently reaffirmed by the Court in its opinion in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. 614, where the Court stated, in considering the enforceability of a choice-of-law clause specifying Swiss law as the governing law, that "we would have little hesitation in condemning the agreement as against public policy" if its application should result in the preclusion of remedies for alleged antitrust violations committed in the United States. Id., 473 U.S. at 637n.19. See also Scherk v. Alberto-Culver Corp., supra, 417 U.S. at 519n.14 (suggesting the same result might follow on grounds of "public policy" if a forum-selection provision in the parties' agreement should result in the deprivation of remedies for violations of federal securities laws). Thus, in the decisions of this Court as in all other courts, this established doctrine has continued to provide an important limitation on the enforceability of choice-of-law clauses.

B. Application of This Settled Rule to the Court of Appeal's Interpretation of the Choice-of-Law Clause at Issue Here Would Require That the Clause, as So Interpreted, Be Held Invalid on the Ground That It Would Contravene the Fundamental Federal Policy Favoring the Arbitration of Private Disputes.

This Court has never had occasion to apply this settled doctrine to a choice-of-law clause selecting the law of a state of the United States, because, as noted above, in every instance in which it has confronted such a provision, it has either ignored it as irrelevant to the applicability of federal law or construed it as encompassing federal as well as state law. Fidelity Federal S. & L. Assn. v. de la Cuesta, supra, 458 U.S. at 157n.12; United States v. Kimbell Foods, Inc., supra, 440 U.S. 715; Scherk v. Alberto-Culver Co., supra, 417 U.S. 506; Bernhardt v. Polygraphic Co., supra, 350 U.S. 198. It is being assumed for purposes of the present discussion, however, that the Court might accept the view of the court below that the choice-of-law clause at issue here must be construed as excluding the application of federal law. In that event, the question would be squarely presented

whether this provision, as so interpreted, would be rendered unenforceable as a violation of federal public policy under the rule described above.

Volt submits that this question would have to be answered in the affirmative. There is plainly no reason why this settled rule would apply with any less force where the violation of federal public policy would arise from state law than where it would arise from the law of a foreign nation. Nor is there any doubt that the state law at issue here would indeed contravene a fundamental federal policy. This Court has repeatedly declared that the Federal Arbitration Act establishes a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, 460 U.S. at 24. Accord Perry v. Thomas, supra, 107 S.Ct. at 2525; Shearson Amer. Express, Inc. v. McMahon, 107 S.Ct. 2332, 2337 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 625; Southland Corp. v.



Keating, supra, 465 U.S. at 10. Given the frequency and vigor with which the Court has underscored the importance of this policy in its recent decisions (id.), it must be accorded at least the same weight as the policies underlying the antitrust and carrier-liability laws that were deemed to justify the Court's pronouncements on the invalidity of choice-of-law clauses in the cases cited above. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 637n.19; The Kensington, supra, 183 U.S. at 269. See also Scherk v. Alberto-Culver Co., supra, 417 U.S. at 519n.14 (securities laws). There is likewise no serious question that the state law that would be applied pursuant to the choice-of-law provision in this case would directly contravene this federal policy, since it would prevent enforcement of an arbitration agreement otherwise subject to the Federal Act in circumstances in which federal law would clearly require that the agreement be enforced. The conclusion is thus unavoidable that if the choice-of-law clause at issue here should be

interpreted as precluding the application of federal law to the present dispute, it should thereupon be declared unenforceable on the ground that, as so interpreted, it would violate the fundamental public policy of the United States as declared by the Federal Arbitration Act.

As noted earlier, several lower courts have already reached precisely this result with respect to choice-of-law clauses designating state law that were claimed to preclude enforcement of arbitration agreements pursuant to the federal Act. Commonwealth Edison Co. v. Gulf Oil Corp., supra, 541 F.2d at 1269; Paul Allison, Inc. v. Minikin Storage, Inc., supra, 486 F.Supp. at 3; State ex rel. St. Joseph Light & Power Co. v. Donelson, supra, 631 S.W.2d at 891-92. See also Mesa Operating Ltd. P'ship. v. Intrastate Gas Comm., supra, 797 F.2d at 243-44 (citing Commonwealth Edison, supra); Huber, Hunt & Nichols, Inc. v. Architectural Stone Corp., supra, 625 F.2d at 25n.8 (semble); Cone Mills Corp. v. August F. Nielsen Co., supra, 455 N.Y.S.2d at 627 (semble). In

this discussion, it has been shown that these decisions were soundly based in settled legal principles and basic considerations of national policy. They should therefore be approved and followed by this Court. In the event the Court should be forced to reach this question by its acceptance of the court of appeal's interpretation of the choice-of-law clause at issue in this case, the Court should accordingly hold, consistently with the rule of these decisions, that the Federal Arbitration Act must govern the disposition of this controversy notwithstanding any contrary prescription of the governing law that might be derived from that clause.

#### CONCLUSION

The choice-of-law clause in the Volt-Stanford contract should be interpreted to encompass the application of the Federal Arbitration Act to this controversy. In any event, even if the clause were to be interpreted otherwise, federal law should be deemed to govern the disposition of this case as a matter of fundamental federal policy. For

either or both of these reasons, the judgment of the California Court of Appeal should be reversed, and the case should be remanded with a direction that Volt's petition to compel arbitration be granted.

Dated: May 25, 1988

Respectfully submitted,

JAMES E. HARRINGTON  
ROBERT B. THUM  
DEANNE M. TULLY  
PETTIT & MARTIN

Attorneys for Appellant

7

No. 87-1318

Supreme Court, U.S.  
**FILED**  
JUL 15 1987

WILLIAM R. STANFORD, JR.  
COUNSEL

In The  
**Supreme Court of the United States**  
October Term, 1987

**VOLT INFORMATION SCIENCES, INC.,**  
*Appellant,*  
vs.

**THE BOARD OF TRUSTEES OF THE LELAND  
STANFORD JUNIOR UNIVERSITY, a body  
having corporate powers,**  
*Appellee.*

**ON APPEAL FROM THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT**

**APPELLEE'S BRIEF ON THE MERITS**

**McCUTCHEN, DOYLE, BROWN  
& ENERSEN**

**DAVID M. HEILBRON  
(Counsel of Record)**

**LESLIE G. LANDAU**

**STEPHEN L. GODCHAUX**

**Three Embarcadero Center  
San Francisco, CA 94111  
Telephone: (415) 393-2000  
Counsel for Appellee  
The Board of Trustees of the  
Leland Stanford Junior  
University**



## QUESTIONS PRESENTED

Two private parties agreed that their private construction contract was to be governed by the law of the place where the construction project was located. The contract contained an arbitration clause. The project was located in Santa Clara County, California, so a state court found that the parties meant their contract to be governed by the law of that place, California, and to arbitrate under the rules set forth in California law. The Court enforced the parties' agreement to arbitrate under the rules set forth in California law, in accordance with the agreement's terms.

1. Does the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, force parties who agree to arbitrate in accordance with state rules to arbitrate instead in accordance with federal rules?

Does that present a substantial federal question?

2. Does the private parties' private agreement mean what the state court found it to mean?

Does that contract interpretation question present a federal question and, if it does, is it substantial?

**LIST OF RELATED COMPANIES REQUIRED BY  
UNITED STATES SUPREME COURT RULE 28.1**

Pursuant to Supreme Court Rule 28.1, Appellee The Board of Trustees of The Leland Stanford Junior University lists the following non-wholly owned subsidiary and affiliate:

Stanford University Hospital

**TABLE OF CONTENTS**

	Page
QUESTIONS PRESENTED .....	i
I. JURISDICTION .....	1
A. First Question .....	1
B. Second Question .....	5
1. Volt's Argument About Names .....	7
2. Volt's Argument That The Ordinary Rule Does Not Apply .....	8
3. Volt's Argument That FAA Rules of Construction Apply .....	12
4. Conclusion As To Jurisdiction With Respect To Volt's Contract Interpretation Question .....	15
II. STATEMENT OF THE CASE .....	17
III. SUMMARY OF ARGUMENT .....	22
IV. ARGUMENT .....	25
A. THE FAA ENFORCES AGREEMENTS IN ACCORDANCE WITH THEIR TERMS, NO MORE, NO LESS .....	25
B. THE CONTRACT MEANT WHAT THE TRIAL COURT AND COURT OF APPEAL FOUND IT MEANT .....	31
1. The Argument that the Court of Appeal's Interpretation of the Contract "Is Discordant With the Common Understanding of the Function" of Choice-Of-Law Clauses .....	37

## TABLE OF CONTENTS—Continued

Page

2. The Argument That the "Literal Terms of the Parties' Contract" Mean What Volt Argues They Mean .....	37
3. The Argument That "Basic Tenets of Federalism Dictate" That The Agreement Be Interpreted Volt's Way .....	38
4. The Argument That "The Only Evidence In The Record, Regarding The Parties' Intent . . . Suggests" That Volt's Interpretation Is Right .....	40
5. The Argument That "The Overwhelming Weight of Authority . . . Supports" Volt's Interpretation .....	41
6. The Argument That The Choice-Of-Law Clause Must Be Generously Construed Because Arbitration Agreements Must Be .....	42
C. SECTIONS 3 AND 4 OF THE FAA WOULD NOT APPLY IN THIS STATE COURT PROCEEDING, EVEN ABSENT THE PARTIES' AGREEMENT .....	43
V. CONCLUSION .....	50

## TABLE OF AUTHORITIES

Page(s)

## CASES

<i>Abie State Bank v. Bryan</i> , 282 U.S. 765 (1931) .....	10
<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985) .....	10
<i>Aro Mfg. Co. v. Convertible Replacement Top Co.</i> , 377 U.S. 476 (1964) .....	9
<i>Atkinson v. Sinclair Refining Co.</i> , 370 U.S. 238 (1962) .....	27
<i>Bernhardt v. Polygraphic Co.</i> , 350 U.S. 198 (1956) .....	25, 45, 46
<i>Bishop v. Wood</i> , 426 U.S. 341 (1976) .....	16
<i>Boyle v. United Technologies Corp.</i> , ___ U.S. ___, 56 U.S.L.W. 4792 (June 27, 1988) .....	11
<i>Bowen v. United States</i> , 570 F.2d 1311 (7th Cir. 1978) ....	34
<i>Brooklyn Sav. Bank v. O'Neil</i> , 324 U.S. 697 (1945) .....	9
<i>Burke County Public Schools Bd. of Ed. v. Shaver P'ship.</i> , 279 S.E. 2d 816 (N.C. 1981) .....	41
<i>Burr v. Western States Life Ins. Co.</i> , 211 Cal. 568 (1931) .....	35
<i>Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.</i> , 445 U.S. 97 (1980) .....	16
<i>Central Vermont Ry. v. White</i> , 238 U.S. 507 (1915) .....	49
<i>Chan v. Drexel Burnham Lambert, Inc.</i> , 178 Cal. App. 3d 632 (1986) .....	28
<i>Claflin v. Houseman</i> , 93 U.S. 130 (1876) .....	39
<i>Commonwealth Edison Co. v. Gulf Oil Corp.</i> , 541 F.2d 1263 (7th Cir. 1976) .....	41, 42
<i>Cone Mills Corp. v. August F. Nielsen Co.</i> , 455 N.Y.S. 2d 625 (N.Y. Sup. Ct. 1982) .....	42
<i>Coover Const. Co. v. Johnson</i> , No. 83 AP-235, slip op. (Ohio Ct. App., August 4, 1983) .....	33

## TABLE OF AUTHORITIES - Continued

	Page(s)
<i>Day &amp; Zimmerman, Inc. v. Challoner</i> , 423 U.S. 3 (1975) .....	6
<i>Dean Witter Reynolds, Inc. v. Byrd</i> , 470 U.S. 213 (1985) .....	3, 21, 27
<i>Delta Lines, Inc. v. International Brotherhood of Teamsters</i> , 66 Cal. App. 3d 960 (1977) .....	29
<i>Demorest v. City Bank Farmers Trust Co.</i> , 321 U.S. 36 (1944) .....	10
<i>Dice v. Akron, Canton &amp; Youngstown R.R. Co.</i> , 342 U.S. 359 (1952) .....	9, 49
<i>Ducey v. United States</i> , 713 F.2d 504 (9th Cir. 1983) ....	33
<i>Episcopal Housing Corp. v. Federal Ins. Co.</i> , 239 S.E. 2d 647 (S.C. 1977) .....	41
<i>Eric A. Carlstrom Constr. Co. v. Independent School Dist. No. 77</i> , 256 N.W. 2d 479 (Minn. 1977) ...	32, 33
<i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64 (1938) .....	5, 49
<i>Fidelity Federal S &amp; L Assn. v. de la Cuesta</i> , 458 U.S. 141 (1982) .....	12, 39, 40, 41
<i>Ford v. Shearson Lehman Amer. Express Co.</i> , 180 Cal. App. 3d 1011 (1986) .....	32
<i>Fox Film Corp. v. Muller</i> , 296 U.S. 207 (1935) .....	6, 10
<i>Fox River Paper Co. v. Railroad Commission of Wisconsin</i> , 274 U.S. 651 (1927) .....	10
<i>Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co.</i> , 140 Cal. App. 3d 251 (1983) .....	32
<i>Garrett v. Moore-McCormack Co.</i> , 317 U.S. 239 (1942) .....	9

## TABLE OF AUTHORITIES - Continued

	Page(s)
<i>Gelley v. Astra Pharmaceutical Products, Inc.</i> , 610 F.2d 558 (8th Cir. 1979) .....	33
<i>Giesler v. Berman</i> , 6 Cal. App. 3d 919 (1970) .....	7
<i>Gowdy v. United States</i> , 412 F.2d 525 (6th Cir. 1969) cert. den. 396 U.S. 960, reh. den. 396 U.S. 1063 .....	33
<i>Guaranty Trust Co. v. York</i> , 326 U.S. 99 (1945) .....	49
<i>Hauenstein v. Lynham</i> , 100 U.S. 483 (1880) .....	39
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941) .....	25
<i>Huber, Hunt &amp; Nichols v. Architectural Stone Co.</i> , 625 F.2d 22 (5th Cir. 1980) .....	41, 42
<i>International Longshoreman's Ass'n v. Davis</i> , 476 U.S. 380 (1986) .....	10
<i>J.W. Petersen Coal &amp; Oil Co. v. United States</i> , 323 F. Supp. 1198 (N.D. Ill. 1970) .....	33
<i>Jenne v. Jenne</i> , 192 Cal. App. 2d 827 (1961) .....	35
<i>Klaxon v. Stentor Mfg. Co.</i> , 313 U.S. 487 (1941) .....	6
<i>Lane-Tahoe, Inc. v. Kindred Constr. Co.</i> , 536 P. 2d 491 (Nev. 1975) .....	32, 33
<i>Liddington v. The Energy Group</i> , 192 Cal. App. 3d 1520 (1982) .....	32
<i>Liner v. Jafco, Inc.</i> , 375 U.S. 301 (1964) .....	9
<i>Local 926, Int'l Union of Operating Engineers v. Jones</i> , 460 U.S. 669 (1983) .....	4
<i>Main v. Merrill Lynch, Pierce, Fenner &amp; Smith, Inc.</i> , 67 Cal. App. 3d 19 (1977) .....	28



## TABLE OF AUTHORITIES - Continued

Page(s)

<i>Mamlin v. Susan Thomas, Inc.</i> , 490 S.W. 2d 634 (Tex.Civ.App. 1973) .....	41
<i>McCarthy Bros. Constr. Co. v. Pierce</i> , 832 F.2d 463 (8th Cir. 1987) .....	33
<i>Merrill Lynch, Pierce, Fenner &amp; Smith v. Ware</i> , 414 U.S. 117 (1973) .....	28
<i>Mesa Operating Ltd. P'ship. v. Louisiana Intra State Gas Corp.</i> , 797 F.2d 238 (5th Cir. 1986) .....	42
<i>Michigan Cannery &amp; Freezers Assn. v. Agricultural Marketing &amp; Bargaining Board</i> , 467 U.S. 461 (1984) .....	25
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985) .....	passim
<i>Mondou v. New York, N.H. &amp; H.R. Co.</i> , 223 U.S. 1 (1912) .....	39
<i>Morton v. Travelers Indemnity Co.</i> , 121 Cal. App. 2d 855 (1953) .....	35
<i>Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.</i> , 460 U.S. 1 (1983) .....	passim
<i>O'Malley v. Wilshire Oil Co.</i> , 59 Cal. 2d 482 (1963) ....	28
<i>Pas-Ebs v. Group Health, Inc.</i> , 442 F. Supp. 937 (S.D.N.Y. 1977) .....	29
<i>Paul Allison, Inc. v. Minikin Storage, Inc.</i> , 486 F. Supp. 1 (D. Neb. 1979) .....	42
<i>Perry Education Ass'n v. Perry Local Educators Ass'n</i> , 460 U.S. 37 (1983) .....	4
<i>Perry v. Thomas</i> , ___ U.S. ___, 107 S. Ct. 2520 (1987) .....	passim

## TABLE OF AUTHORITIES - Continued

Page(s)

<i>Pickens v. Hess</i> , 573 F.2d 380 (6th Cir. 1978) .....	33
<i>Prima Paint Corp. v. Flood &amp; Conklin</i> , 388 U.S. 395 (1967) .....	26, 27, 45, 46
<i>Ramirez v. Wilshire Ins. Co.</i> , 13 Cal. App. 3d 622 (1970) .....	7
<i>Reliance Life Ins. Co. v. Jaffe</i> , 121 Cal. App. 2d 241 (1953) .....	35
<i>Richards v. United States</i> , 369 U.S. 1 (1962) .....	33
<i>Robinson v. United States</i> , 408 F. Supp. 132 (N.D. Ill. 1976) .....	34
<i>Safer v. Perper</i> , 569 F.2d 87 (D.C. Cir. 1977) .....	33
<i>Scherk v. Alberto-Culver Co.</i> , 417 U.S. 506 (1974) .....	27, 30, 31, 41
<i>Shearson Amer. Express, Inc. v. McMahon</i> , ___ U.S. ___, 107 S. Ct. 2332 (1987) .....	27
<i>Silkwood v. Kerr-McGee Corp.</i> , 464 U.S. 238 (1984) ..	4, 5
<i>Smith v. Pena</i> , 621 F.2d 873 (7th Cir. 1980) .....	33
<i>Sola Electric Co. v. Jefferson Electric Co.</i> , 317 U.S. 173 (1942) .....	9
<i>South Dakota v. Neville</i> , 459 U.S. 553 (1983) .....	10
<i>Southern Pac. Transp. Co. v. United States</i> , 471 F. Supp. 1186 (E.D. Cal. 1979) .....	33
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 (1984) .....	passim
<i>Standard Co. v. Elliott Constr. Co., Inc.</i> , 363 So. 2d 671 (La. 1978) .....	32, 33



## TABLE OF AUTHORITIES - Continued

Page(s)

<i>Starr Elec. Co., Inc. v. Basic Constr. Co.</i> , 586 F. Supp. 964 (M.D.N.C. 1982) .....	33
<i>State ex rel. St. Joseph Light &amp; Power Co. v. Donelson</i> , 631 S.W. 2d 887 (Mo.App. 1982) .....	42
<i>Stoleson v. United States</i> , 708 F.2d 1217 (7th Cir. 1983) .....	33
<i>Sun Oil Co. v. Wortman</i> , 56 U.S.L.W. 4601 (June 15, 1988) .....	48, 49, 50
<i>Swift v. Tyson</i> , 41 U.S. 1-(1842) .....	6, 13, 36
<i>Tennessee River Pulp &amp; Paper Co. v. Eichleay Corp.</i> , 637 S.W. 2d 853 (Tenn. 1982) .....	41
<i>Testa v. Katt</i> , 330 U.S. 386 (1947) .....	39
<i>The Kensington</i> , 183 U.S. 263 (1901) .....	30, 31
<i>United States v. Little Lake Misere Land Co.</i> , 412 U.S. 580 (1973) .....	11
<i>United States v. Sutro</i> , 235 F.2d 499 (9th Cir. 1956) ....	33
<i>United States Fidel. &amp; G. Co. v. Bangor Area Jt. Sch.</i> <i>Auth.</i> , 355 F. Supp. 913 (E.D. Penn. 1973) .....	33
<i>Vespe Contracting Co. v. Anvan Corporation</i> , 399 F. Supp. 516 (E.D. Pa. 1975) .....	29
<i>Zacchini v. Scripps-Howard Broadcasting Co.</i> , 433 U.S. 562 (1977) .....	10
<i>Zenith Radio Corp. v. Hazeltine Research Co.</i> , 401 U.S. 321 (1971) .....	9

## TABLE OF AUTHORITIES - Continued

Page(s)

## STATUTES AND RULES

9 U.S.C. § 1 <i>et seq.</i> .....	<i>passim</i>
18 U.S.C. § 1821 .....	34
28 U.S.C. § 1254(2) .....	4, 5
28 U.S.C. § 1257(2) .....	1, 4, 5, 16
28 U.S.C. § 1257(3) .....	4, 16
28 U.S.C. § 2672 .....	34
28 U.S.C. § 2674 .....	33
28 U.S.C. § 534(a)(3) .....	34
28 U.S.C. § 849(c) .....	34
28 U.S.C. § 1346(b) .....	33
38 U.S.C. § 103(c) .....	34
Cal. Corp. Code § 31512g .....	5
Cal. Lab. Code § 229 .....	5
Cal. Civ. Code § 1644 .....	11, 35, 38
Cal. Civ. Code § 1646 .....	11, 35
Cal. Civ. Proc. Code § 1281.2(c) .....	<i>passim</i>
Cal. Civ. Proc. Code § 1281.5 .....	15
Cal. Civ. Proc. Code § 1283.05 .....	15
Cal. Civ. Proc. Code § 1283.1 .....	15
Cal. Civ. Proc. Code § 1288 .....	15
H.R. Rep. No. 96, 68th Cong. 1st Sess. 1 (1924) ..	2, 26
Sup. Ct. R. 16.8 .....	1
Sup. Ct. R. 17 .....	4, 16

## TABLE OF AUTHORITIES – Continued

	Page(s)
MISCELLANEOUS	
<i>Federalist</i> Nos. 16, 27.....	39
Feldman, <i>Arbitration Modernized – The New California Arbitration Act</i> , 34 So. Calif. L. Rev. 413 (1961) .....	28
Hart, <i>The Relations Between State and Federal Law</i> , 54 Colum. L. Rev. 489 (1954) .....	7, 36, 48
Hart & Wechsler, <i>The Federal Courts and The Federal System</i> (2d ed. 1973) .....	49
Mishkin, <i>The Variousness of "Federal Law": Competence And Discretion In The Choice Of National and State Rules For Decision</i> , 105 U. Pa. L. Rev. 797 (1957) .....	7
Restatement (2d) of Conflict of Laws, § 10, Reporter's Note .....	7

## I. JURISDICTION

Appellant asserts that 28 U.S.C. § 1257(2) provides "the statutory basis of the Court's jurisdiction" on this appeal (O. Br. 1),<sup>1</sup> but it does not. This case presents two questions. The first is federal but not substantial, the other is not federal or substantial, and neither presents a § 1257(2) question for review. We address those questions here, because the Court postponed further consideration of jurisdiction to the hearing on the merits. (Supreme Court Rule 16.8)

## A. First Question

The California Court of Appeal, "the highest court of the State in which a decision could be had" (O. Br. 4), found that Volt and Stanford had agreed to arbitrate in accordance with the rules set forth in California law. (Dec. J.A. 65) The trial court applied the rule set forth in California Code of Civil Procedure ("CCP") § 1281.2(c) to the parties' agreement to arbitrate,<sup>2</sup> and so enforced the agreement in accordance with its terms. The Court of Appeal affirmed. (Dec. J.A. 78-80)

The parties' contract was in interstate commerce. Therefore, the rules set forth in the Federal Arbitration

---

<sup>1</sup> We refer to Appellant's Opening Brief as "O. Br. \_\_\_\_" the Joint Appendix as "J.A. \_\_\_\_" the California Court of Appeal's decision in this case as "Dec. J.A. \_\_\_\_" Appellant Volt Information Sciences, Inc. as "Volt" and The Board of Trustees of The Leland Stanford Junior University as "Stanford."

<sup>2</sup> Section 1281.2(c) permits a court to stay an arbitration to avoid piecemeal, duplicative litigation and the danger of conflicting judgments with respect to the same set of facts. See p. 20, below.

Act, 9 U.S.C. § 1, *et seq.* ("FAA"),<sup>3</sup> would have applied to their agreement (O. Br. 63-64) had the parties not agreed that California rules would apply to it. The Court of Appeal having enforced the parties' agreement to arbitrate in accordance with California rules, this question is put: Does the FAA force parties who agree to arbitrate in accordance with state rules to arbitrate instead in accordance with federal rules?

That question is federal, but insubstantial; the answer is no. Arbitration is a matter of agreement. Parties can agree to arbitrate in any way they want; thus they can agree to arbitrate some disputes, and not all, in some circumstances, and not all, or not at all. A court cannot force parties to arbitrate a dispute they have not agreed to arbitrate or in a way they have not agreed to arbitrate. Those are basic principles of arbitration law, and the FAA does not change them.

The FAA is meant to put arbitration agreements "upon the same footing as other contracts." H.R. Rep. No. 96, 68th Cong. 1st Sess. 1 (1924); *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984). It prohibits a state or federal

<sup>3</sup> Actually, §§ 1 and 2 of the FAA would apply, but §§ 3 and 4, the procedural provisions of the FAA, would not apply in state court proceedings, whether or not the parties had agreed to be bound by state court rules. CCP § 1281.2(c) does not conflict with §§ 1 and 2 of the FAA, whether or not it does with §§ 3 and 4; accordingly, the FAA would not have prevented the state court's application of CCP § 1281.2(c) in state court proceedings, whether or not the parties had agreed to arbitrate in accordance with state court rules. The Court, however, need not reach this question. See Argument, Part IV C, below.

court from refusing to enforce an arbitration agreement subject to the FAA in accordance with the agreement's terms. See, e.g., *Southland Corp.*, above, 465 U.S. at 16 n.11 (state cannot refuse to arbitrate Franchise Act claims where parties agreed to arbitrate them). The FAA does not mandate any court to disregard the parties' agreement, much less compel parties to arbitrate a dispute they have not agreed to arbitrate or in a way they have not agreed to arbitrate. To the contrary. The FAA mandates that courts enforce arbitration agreements in accordance with their terms, no more, no less. See Argument, Part IV A, below; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (emphasis added):

*"The legislative history of the Act establishes that the purpose behind the passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement – upon the motion of one of the parties – of privately negotiated arbitration agreements."*

That is settled law; there is no authority the other way. See Argument, Part IV A, below. The Court of Appeal's decision followed that settled law. It held that the parties were free "to choose the terms under which they will arbitrate"; that that choice "will not run afoul of the FAA;" and that it would turn those basic principles of arbitration law and the FAA upside down were the Court to force the parties to arbitrate under federal, not state, rules when they had agreed to arbitrate under state, not federal, rules. (Dec. J.A. 71-73) Therefore, it enforced the parties' agreement.

Accordingly, the federal question this case puts is settled, not substantial. Certainly it presents no "special



and important reasons" for review by certiorari under 28 U.S.C. § 1257(3) and Supreme Court Rule 17. It presents no ground for appeal under 28 U.S.C. § 1257(2). Section 1257(2) provides for appeal "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The Court of Appeal's decision does not uphold the validity of § 1281.2(c) as not repugnant to the laws or Constitution of the United States; the decision assumed the laws of the United States would apply but for the parties' agreement. (Dec. J.A. 65; O. Br. 62-63) The Court of Appeal's decision simply upholds the validity of the parties' agreement as not repugnant to the laws or Constitution of the United States. (Dec. J.A. 71-73)

That decision is in accord with settled federal law, presents no substantial federal question (pp. 2-3, above, 25-30, below), and since it validates an agreement, not a state statute, is not subject to review by appeal under § 1257(2). See *Local 926, Int'l Union of Operating Engineers v. Jones*, 460 U.S. 669, 675 n.7 (1983) (decision upholding validity of state common law tort action not appealable under § 1257(2), since state common law is not a "state statute"); *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 42 (1983) (decision as to invalidity of sections of collective bargaining agreement not appealable under 28 U.S.C. § 1254(2), the reciprocal of § 1257(2), because an agreement is not a statute, and the statute under which agreement made was not found invalid); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984) (decision as to invalidity of punitive damages award rendered under statute not appealable under § 1254(2), because an award is not a statute, and statute was not

found invalid). Contrast *Southland Corp.*, above, 465 U.S. at 6-8 (decision upholding validity of Cal. Corp. Code § 31512g, a statute, appealable under § 1257(2)); *Perry v. Thomas*, \_\_\_ U.S. \_\_\_, 107 S. Ct. 2520, 2525 n.7 (1987) (decision upholding validity of Cal. Lab. Code § 229, a statute, appealable under 1257(2)).<sup>4</sup>

Volt has nothing to say about any of this.<sup>5</sup>

## B. Second Question

The Court of Appeal construed the clause "law of the place where the project is located" to mean the law of California, where the project was located. It had "no doubt" that that is what the parties "intended" the "word 'place' " to "mean." (Dec. J.A. 66)<sup>6</sup>

Volt objects to that "interpretation" (O. Br. 37, 38) of the parties' choice-of-law clause and argues that there was no "extrinsic evidence" to support it. (O. Br. 48, 75) The clause really means, Volt goes on, California-law-

<sup>4</sup> *Silkwood* also notes the relevance of § 1257 and § 1254 cases to one another, because of the "history of . . . close relationship between" them. 464 U.S. at 247 n.9 (citation omitted)

<sup>5</sup> Indeed, Volt's jurisdictional argument proves the point. Almost all of it is directed to the contract interpretation (state law) question. (O. Br. 25-54, 55-58) As to this (federal) question, Volt says that if the arbitration "clause" means what the Court interpreted it to mean, the "clause" (not § 1287.2(c)) would violate "federal policy." (O. Br. 54-55)

<sup>6</sup> Volt paraphrases the Court's determination, incorrectly, this way:

" '[w]e have no doubt' that the particular terms of this clause were meant to exclude federal law from any application to this controversy (J.A. 66)." (O. Br. 38)

plus-the-law-of-all-the-"political-entities"-whose-laws-"are-applicable-in-one-way-or-another"-in-California, specifically including federal law. (O. Br. 75) That is Volt's "principal contention" on this "appeal." Therefore, the second, and according to Volt, principal question is whether the Court's or Volt's interpretation of the parties' choice-of-law clause is right.

That is not a federal question. Volt admits "that the general subjects of choice-of-law and contract interpretation are ordinarily regarded as the exclusive concern of the state courts and legislatures . . ." (O. Br. 26), and that is certainly so. *Klaxon v. Stentor Mfg. Co.*, 313 U.S. 487, 496 (1941) (federal court in diversity case must apply state conflicts rules); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (same; "federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits"). *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71, 75, 78 (1938) (holding that "there is no federal general common law," and overruling *Swift v. Tyson*, 41 U.S. 1, 18 (1842); *Swift* had held that federal general common law existed and applied, among other things, "to the construction of ordinary contracts" and "the true exposition of the contract . . ."); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (state law determines whether clause in private contract is severable).

Volt tries to metamorphose this state choice-of-law/contract-interpretation question into a federal question, and starts with names.

# 1. Volt's Argument About Names.

Volt says, first, that the rule that state choice-of-law rules govern private contracts only applies to " 'horizontal' choices between the laws of two different states," not to a " 'vertical' choice between state and federal law," because no one calls a vertical conflict a " 'choice of law' problem." (O. Br. 27)

Volt admits that "no direct citation can be provided for this conclusion" (O. Br. 28), and it is wrong. The rule that state choice-of-law rules govern private contracts does not depend on the angle of relationship between laws, or geometry. For example, state law governs choices as to private contracts between the laws of states and foreign sovereigns, whose relationships are hardly horizontal. Restatement (2d) of Conflict of Laws, § 10, Reporter's Note. See, e.g., *Ramirez v. Wilshire Ins. Co.*, 13 Cal. App. 3d. 622 (1970) (conflict between California and Mexican law); *Giesler v. Berman*, 6 Cal. App. 3d. 919 (1970) (conflict between California and Swiss law). Moreover, if names matter, courts and commentators in fact call choices between state and federal law choice-of-law problems. See, e.g., *Perry v. Thomas*, 107 S. Ct. at 2527 n.9 (referring to "choice-of-law issue" as between "federal and state law principles"); Hart, *The Relations Between State And Federal Law*, 54 Colum. L. Rev. 489, 506 (1954); Mishkin, *The Variousness Of Federal Law: Competence And Discretion In The Choice Of National And State Rules For Decision*, 105 U. Pa. L. Rev. 797, 802-3 (1957).

But, Volt goes on, the issue as to whether state or federal law applies here is not one of " 'choice of law' at all, but is instead a straightforward issue of federal supremacy. . . ." "Any other conclusion," Volt warns, would "consign the entire issue of Supremacy Clause



adjudication to the courts of the fifty states. . . ." (O. Br. 28) That hyperbole reflects Volt's fundamental error. Federal law is no doubt supreme, and whether a federal law preempts a conflicting state law is no doubt a federal question. That is not this question.

Here private parties chose to be governed by the law of the place where their project was located. The question is what the parties meant. The answer turns on intent, not the Constitution; the Supremacy Clause does not tell private parties what they intend, and what they intend does not affect the Supremacy Clause.<sup>7</sup>

State law determines the interpretation of clauses in private parties' contracts; what one names the clause does not matter. Therefore state law determines what these parties' choice-of-law clause means, whether or not Volt's contention is right that the clause ought not be called a choice-of-law clause. Volt grants that to be the rule "ordinarily." (O. Br. 29) That ordinary rule governs.

## 2. Volt's Argument That The Ordinary Rule Does Not Apply.

Volt says the ordinary rule does not apply for two reasons. First, Volt notes that the interpretation of a "waiver or release of rights conferred by a federal statute" is governed by federal law. That is true. Volt says the parties' agreement to be governed by California law is the same as a release of the right to arbitrate under federal law. (O. Br. 30-36) That is false. A release gives up

<sup>7</sup> The Supremacy Clause makes federal law supreme, "anything in the *Constitution* or *Laws* of any State to the contrary notwithstanding." Constitution, Article VI (emphasis added) It says nothing about private intent.

claims that have arisen under a place's law.<sup>8</sup> An agreement to be governed by a place's law gives up no claim; it chooses the law under which claims are to be resolved when they arise. Moreover, it makes sense for the law of the place that creates a right to determine its release. See *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. at 361-63 (state law ought not control what "defeats" a federal claim). It makes no sense for the law of the place parties did not choose to determine their rights under the law of the place they did choose.<sup>9</sup>

Second, Volt objects that the Court of Appeal "invoked no general rule of contract interpretation or

---

<sup>8</sup> See Volt's Supreme Court cases, O. Br. 31-32: *Zenith Radio Corp. v. Hazeltine Research Co.*, 401 U.S. 321, 343-44 (1971) (effect of release of federal antitrust claim); *Aro Mfg. Co. v. Convertible Top Co.*, 377 U.S. 476, 500-01 (1964) (effect of release of patent infringer); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361-62 (1952) (effect of release of FELA claim); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704-07, 715 (1944) (effect of release of Fair Labor Standards Act claim); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243-47 (1942) (effect of release of Merchant Marine Act claim). Volt's other two cases are even further off the mark. See *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 175-76 (1942) (Sherman Act preempts use of common law estoppel rules to permit price fixing); *Liner v. Jafco, Inc.*, 375 U.S. 301, 308-09 (1964) ("local rules which purport to preclude state appellate court jurisdiction of [a] federal preemption claim cannot conclusively render the case moot for the purposes of this Court's review").

<sup>9</sup> Particularly where the law of the place they chose – the state – "ordinarily" (Volt's word) determines the interpretation question to begin with.

choice-of-law" – no "rule of general application."<sup>10</sup> Instead, Volt says the Court adopted the "specialized rule" that "law of the place where the project is located" means the law of the state where the project is located, not the laws of the United States. (O. Br. 38-40) That supposed rule, Volt goes on, is "precisely and narrowly intended to foreclose the application of federal law." (O. Br. 42) Therefore, Volt advises, the federal interest "in the substantive content" of the "specialized rule" is "of the same order of magnitude as the federal interest in the resolution of any question of federal supremacy." (O. Br.

---

<sup>10</sup> Volt claims that "earlier cases" hold that a state law principle does not provide an "independent state ground" where the principle is not of general application. (O. Br. 37-38) But: (1) We agree there is a federal question here [Question 1, above], and do not claim the Court of Appeal's interpretation of the contract is an "independent state ground" foreclosing review of that question. (2) Volt's cases do not say that a state law principle must be of "general application" anyway. They deal with other things. See *Ake v. Oklahoma*, 470 U.S. 68 (1985) (state procedural rule was not independent ground because its application turned on whether federal constitution was violated); *International Longshoreman's Ass'n v. Davis*, 476 U.S. 380 (1986) (federal preemption must be considered whenever it arises in state court); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (Court decided first amendment question, leaving state intellectual property question for state court); *South Dakota v. Neville*, 459 U.S. 553 (1983) (reversing State Court ruling suppressing evidence of refusal to take blood test); *Fox River Paper Co. v. Railroad Commission of Wisconsin*, 274 U.S. 651 (1927) (accepting State Court ruling on riparian rights); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (1944) (accepting State Court ruling on property rights); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935) (accepting State Court ruling on severability of contract); *Abie State Bank v. Bryan*, 282 U.S. 765 (1931) (reviewing State Court estoppel ruling that turned on federal constitutional right).

40-41) Volt acknowledges that it lacks "supportive authority for this conclusion," but finds *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973), "the closest analogue." (O. Br. 41)

*Little Lake Misere* has nothing to do with Volt's proposition. It merely held invalid a state law that retroactively took away the property right of the United States and no one else. 412 U.S. at 597-601.<sup>11</sup> Volt's proposition likewise has nothing to do with this case. The Court of Appeal did not adopt any rule, much less a "specialized rule" intended "to foreclose the application of federal law." The Court simply interpreted a provision in the private contract before it, and determined what it meant. The Court – like the trial court – had "no doubt" what it meant.

There are indeed rules of "general application" which informed the Court's determination. They are familiar and hardly sinister: "A contract is to be interpreted according to the law and usage of the place where it is to be performed," and its words "are to be understood in their ordinary and popular sense. . . ." See California Civil Code §§ 1644, 1646.<sup>12</sup>

---

<sup>11</sup> See *Boyle v. United Technologies Corp.*, \_\_\_ U.S. \_\_\_, 56 U.S.L.W. 4792, 4793 (June 27, 1988) (noting *Little Lake Misere* and like cases dealt with "uniquely federal interest" that "obligations to and rights of the United States under its contracts are governed exclusively by federal law").

<sup>12</sup> We return to these familiar state rules at Argument, Part IV B, below. The Court did not cite those rules, nor did the parties, and there was no occasion to. The truth that the contract should be interpreted in accordance with its plain meaning and local usage was not in issue. No one suggested that federal law determined what the contract meant.



The "substantive content" of those common sense rules presents no federal – let alone Supremacy Clause – question.

### 3. Volt's Argument That FAA Rules of Construction Apply.

Volt says that "any interpretation of a contract determining the arbitrability of a dispute under the Federal Arbitration Act must be infused by a sympathetic attunement to the federal policy favoring arbitration." (O. Br. 49-50) Therefore, Volt says, "no state-court construction of any contractual provision which determines the arbitrability of a dispute subject to the Federal Arbitration Act can ever be truly independent of the influence of federal law." (O. Br. 51, emphasis added) Accordingly, Volt apparently concludes, the interpretation of the parties' choice-of-law clause is a federal question.<sup>13</sup>

Volt's proposition is amazing. According to it, federal law governs the interpretation of "any" provision in a

<sup>13</sup> Volt claims that *Fidelity Federal S. & L. Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), resolves the "jurisdictional issue" as to whether interpretation of this clause presents a federal question, "albeit *sub silentio*." (O. Br. 43) But silence states no rule. We address *Fidelity* on the merits in Argument, Part IV B, below.

Volt also says that interpretation of the clause is "necessarily dependent upon and interwoven with an issue of federal law," so it cannot be an "independent state ground" precluding review. (O. Br. 46-47) We do not contend that the interpretation of the agreement provides an independent state ground precluding review of the federal, but insubstantial, question present here. See Question 1, above. Accordingly, we do not respond to Volt's non-independent-state-ground arguments. (O. Br. 45-58)

contract in interstate commerce containing an arbitration clause, whatever the provision is, where the interpretation of it bears on arbitrability. So federal law becomes the potential determinant of the meaning of every clause in a private contract containing an arbitration clause, and *Swift v. Tyson* is, so far, born again.

That is not the law. The law is that the "federal substantive law of arbitrability" is applicable to the construction of the "arbitration agreement" itself, and requires that *that agreement* be "generously construed." See *Mitsubishi*, above, 473 U.S. at 626; *Moses H. Cone*, above, 460 U.S. at 24-25. Volt says the same thing elsewhere: "The [*Mitsubishi - Moses H. Cone*] rule requires that all *such agreements* [to arbitrate] be 'generously construed.'" (O. Br. 94; emphasis added.)

Federal law is not applicable to the interpretation of provisions in a private contract other than the arbitration agreement, whether or not their interpretation "bears on arbitrability." *Perry v. Thomas*, above, so holds. There, among other things, a party resisting arbitration argued that two parties seeking to enforce the arbitration agreement were not parties to the contract which contained the agreement, and therefore had no "standing" to enforce it. This Court observed that that argument "presents a straightforward issue of contract interpretation":

As we perceive it, Thomas' "standing" argument simply presents a straightforward issue of contract interpretation: whether the arbitration provision inures to the benefit of appellants and may be construed, in light of the circumstances surrounding the litigants' agreement, to cover the dispute that has arisen between them.

107 S.Ct. at 2527

The resolution of that contract interpretation issue obviously "bore on arbitrability," indeed determined it. This Court nevertheless remanded that "issue" to the state court, and held that state law respecting the interpretation of contracts generally governed it (but that a state law principle that took "its meaning precisely from the fact that a contract to arbitrate is at issue" would not):

[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern the validity, revocability, and enforceability of contracts generally. A state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.

107 S.Ct. at 2527 n.9 (emphasis in original).

The rule could not be otherwise. If it were, federal law would determine the interpretation of a provision in a contract where it affected arbitrability, and state law would determine interpretation of the same provision in the same contract where it did not. So the same words in the same provision could mean different things depending on whether federal or state law determined what they meant. Parties do not use the same words in the same provision to mean different things.<sup>14</sup>

<sup>14</sup> For example, on Volt's theory the choice-of-law clause here would mean state-plus-federal law when applied to the arbitration clause, and state law only when applied anywhere else.

(Continued on following page)

The Court of Appeal interpreted the parties' choice-of-law clause, guided by California law respecting the interpretation of "contracts generally." It did not base its interpretation on any "state law that takes its meaning precisely from the fact that a contract to arbitrate is at issue . . . ." (See Part I B 2, above) Therefore its interpretation presents a state, not federal, question.

#### 4. Conclusion As To Jurisdiction With Respect To Volt's Contract Interpretation Question.

We deal with Volt's arguments on the merits of this state contract question in the Argument, Part IV B. The merits do not bear on jurisdiction, but what Volt presumably wants this Court to do on the merits does. What does Volt want this Court to do in respect to the contract interpretation question Volt presents to it? Rule that the

---

(Continued from previous page)

Moreover, the choice-of-law provision here is arbitration neutral. California law is "friendly to arbitration," (p. 28 n.20, below) and some provisions of California law are more favorable to arbitration than federal law is. For example, California law provides four years to enforce an arbitration award and federal law one (CCP § 1288; 9 U.S.C. § 9); California law provides for discovery with respect to some arbitrations, and federal law provides for none (CCP §§ 1283.05, 1283.1); California law provides that the filing of a mechanics lien action does not waive the right to arbitrate, and federal law says nothing about that. (CCP § 1281.5) Volt's theory is that the choice-of-law clause must be interpreted to favor arbitration. (O. Br. 94) Is the clause to mean federal law when that is more favorable to arbitration, and California law when it is not, so the clause means different things at different times on that score as well?



Court of Appeal erred in interpreting the choice-of-law clause in these parties' private contract? Reinterpret the clause in that private contract? Hold that the words "law of the place where the project is located" mean state-plus-federal law in all private contracts? So hold (a) whether that is the popular meaning of the words or not or (b) because this Court finds that is the popular meaning of the words in (1) California or (2) everywhere?

None of those questions is federal. Even if any were, there is no occasion for this Court to answer them. Certainly the Court of Appeal's interpretation of this private contract does not draw in question the validity of a state statute as repugnant to the Constitution or laws of the United States, so the Court's interpretation is not subject to review by appeal under 28 U.S.C. § 1257(2).<sup>15</sup> Certainly none of those contract interpretation questions presents "special and important reasons" for review by certiorari under 28 U.S.C. § 1257(3) and Supreme Court Rule 17. Local courts ought to determine the meaning of words used locally. See pp. 31-37, below. This Court does not sit to determine what they mean, nor sit to review error, particularly state law error. See *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97, 111-112 (1980) (this Court accords "great weight" to state's highest court on "matters of state law"); *Bishop v. Wood*, 426 U.S. 341, 346 n.10 (1976) (same; local courts are "familiar" with "local law and practice").

There was no error, state or federal, here.

<sup>15</sup> Volt's waiver cases (n. 8, above), for example, came to this Court by writ of certiorari, not by appeal under 28 U.S.C. § 1257(2).

## II. STATEMENT OF THE CASE

The underlying dispute arises out of a construction project at the Stanford University campus adjoining Palo Alto, California. Volt was the construction contractor for the project. (J.A. 9, 29-35) During the course of construction, Stanford terminated the Volt contract because of Volt's material breaches of it. (J.A. 9) Volt then requested reinstatement, the parties negotiated about that, and they signed a reinstatement agreement. (J.A. 9-10) In the reinstatement agreement Volt agreed it would not seek any additional compensation for work it performed in order to remedy its past breaches of the construction contract. (J.A. 10)

On August 27, 1986, Volt presented Stanford with a demand for arbitration of a claim that seeks additional compensation for the work Volt performed to remedy its own breaches of the construction contract and for which it agreed it would not seek additional compensation. (J.A. 10-11, 48-52) Thus Volt violated the reinstatement agreement and broke its promise not to seek compensation for the corrective work its earlier breaches required. Volt claimed instead that the corrective work was necessary primarily because construction drawings and project management provided to Stanford by defendants Brian-Kangas-Foult & Associates ("BKF&A") and Telecommunications International, Inc. ("TII") were inadequate. (J.A. 51-52)<sup>16</sup> Volt seeks to hold Stanford, as the owner of the property on which the project was constructed, liable for the claimed errors of TII and BKF&A.

<sup>16</sup> BKF&A and TII were defendants, but had not appeared when the motions to stay and compel arbitration were argued, and were not parties to the trial court's order staying arbitration, the subject of this "appeal."



The contract between Stanford and Volt provides that it shall be governed by the law of "the place where the Project is located." (J.A. 37) Subject to the provisions of the governing law and the rules of the American Arbitration Association, the parties also agreed to arbitrate disputes "relating to this contract or the breach thereof." (J.A. 40) The contracts between Stanford and TII and Stanford and BKF&A contain no arbitration provision. (J.A. 11-12, 44-45)

Volt points out that the arbitration clause in its contract provided that in "any other arbitration, *commenced or demanded pursuant to this Contract*, . . . either party . . . shall join in such arbitrations and agree to the consolidation of the arbitrations." (O. Br. 8; emphasis added) Volt says that that clause provides "for the consolidation of separate arbitrations that might arise from the parties' transaction," and so complains that that clause would have helped it consolidate arbitrations had Stanford not "inexplicably neglected to include arbitrations agreements" in its contracts with TII and BKF&A. (O. Br. 9-10) But: (1) That clause would not have helped Volt consolidate anything, because it does not apply to "consolidation of arbitrations that might arise from the parties' transaction." It only applies to consolidation of arbitrations "commenced or demanded pursuant to this contract," and neither TII or BKF&A was a party to the Volt-Stanford contract. (2) Volt has a cavalier view as to how agreements are made. One party does not just "include" provisions in them; both parties to them negotiate terms, and agree to some but not others. Stanford, TII and BKF&A did not agree to arbitrate. That is the fact that matters here.

On August 27, 1986, Stanford and Volt concluded settlement discussions seeking to resolve their dispute.

That is the same day that Volt filed its arbitration demand. (J.A. 48-52) One week later, on September 4, 1986, Stanford filed its complaint in the Superior Court, naming as defendants Volt, BKF&A and TII. (J.A. 6-27) The complaint states claims against Volt based upon, among other things, fraud, estoppel, breach of contract, and bad faith denial of the existence of a contract. It also asks for a judgment declaring that, if Stanford is held liable to Volt on account of TII or BKF&A's errors, then TII or BKF&A must indemnify Stanford for any amounts it must pay Volt.

Stanford could not arbitrate its indemnity claims against TII and BKF&A, because it had no arbitration agreement with either of them. If Stanford were forced to arbitrate Volt's claims alone before an arbitrator, the arbitration could result in a determination that TII and BKF&A drawings or TII's project management were inadequate, and an award for Volt. If Stanford then were forced separately to litigate its indemnity claims against TII and BKF&A in court, TII and BKF&A might not be bound by the arbitrator's award. A court or jury could find that their drawings and management were adequate, and deny indemnity. That would be most unfair. If Volt were at fault, it must suffer its losses. If TII and BKF&A were at fault, it must pay for those losses. Stanford should not have to pay for them in any case, because the fault was either Volt's or TII's and BKF&A's, not Stanford's.

Stanford filed its lawsuit in Superior Court to avoid the danger of those conflicting results and to resolve all these disputes at the same time and place. The Superior Court was the only forum in which Volt's claims against Stanford and Stanford's claims against Volt, TII and BKF&A all could be resolved at the same time and place.

Volt moved to stay the Superior Court proceeding while the arbitration went forward, and Stanford sought an order under CCP § 1281.2(c) staying the arbitration while the litigation went forward. CCP § 1281.2(c) provides that (1) where a party to an arbitration agreement is also a party to a court action; and (2) where the Court action and arbitration arise out of the same transaction; and (3) where there is a possibility of conflicting rulings on common questions of law and fact, the Superior Court may stay the arbitration and try those common questions in a single proceeding. Section 1281.2(c)'s purpose is to avoid piecemeal litigation and conflicting rulings. All three of its conditions were met here.

Volt argued to the Superior Court that the clause in the parties' agreement providing that the agreement shall be governed by the "law of the place where the Project is located" did not mean that California law, where the Project is located, governed. Rather, Volt said, the agreement was in interstate commerce; the FAA accordingly applied to it, absent the choice-of-law clause; and the choice-of-law clause changed nothing, since it really meant that the FAA, not California law, governed. The FAA contains no counterpart provision to CCP § 1281.2(c). Accordingly, Volt's argument concluded, § 1281.2(c) did not apply here.

The Superior Court found that the parties meant that California law was to govern their agreement. (See J.A. 59-60; O. Br. 13) Accordingly, the Superior Court held that CCP § 1281.2(c), which is part of California law, applied, and stayed the arbitration under it. (J.A. 59-60)

Volt appealed to the Sixth Appellate District Court of Appeal. The Court of Appeal affirmed. It did not "find reasonable Volt's interpretation that the 'place' where the project is located be construed to mean not only the State of California but also the nation of the United States of America." It found that the "word 'place' was intended to mean the forum state," and it had "no doubt" the parties meant that. (Dec. J.A. 66)

The court further found that the parties' agreement did not violate federal law, because "the thrust of the federal law is that arbitration is strictly a matter of contract." (Dec. J.A. 71) The FAA does not "mandate the arbitration of all claims, but merely the enforcement . . . of privately made arbitration agreements." (Dec. J.A. 69-70, quoting *Dean Witter Reynolds, Inc. v. Byrd*, above, 470 U.S. at 213) "The parties are at liberty," the court went on, "to choose the terms under which they will arbitrate, and such a choice will not run afoul of the FAA." (Dec. J.A. 72) The court concluded that "were the federal rules to be imposed in this case to override the parties' choice of law, the effect would be to force the parties to arbitrate where they had agreed not to arbitrate. This result is . . . inimical to the policies underlying state and federal arbitration law. . . ." (Dec. J.A. 73)<sup>17</sup>

The court enforced the agreement, including its choice-of-law clause, according to its terms. Volt

---

<sup>17</sup> The court also found that the parties could have "expressly stated in their agreement that they wished to arbitrate only those disputes between themselves which did not involve third parties not bound by the arbitration agreement. . . ." (Dec. J.A. 72) Volt agrees. (O. Br. 84) The court determined that by their choice-of-law clause the parties essentially agreed to the same thing. See pp. 29-30, below.



petitioned the Supreme Court of California for review. It told the Supreme Court that the "principal issue" presented by this case was whether the Court of Appeal misinterpreted the choice-of-law clause. (Volt's Petition for Review at 1) The Supreme Court denied the petition and directed that the Court of Appeal's decision not be published. (J.A. 87)

This appeal followed, and was timely filed. (O. Br. 5)

### III. SUMMARY OF ARGUMENT

The trial court found that the parties had agreed that California law, of which CCP § 1281.2(c) is a part, was to govern their contract. The court applied § 1281.2(c) to the contract, issued a stay under it, and so enforced the contract in accordance with its terms. That is exactly what the court should have done.

Arbitration is a matter of agreement and the FAA does not change that. To the contrary, it makes arbitration agreements enforceable according to their terms, no more, no less; every case decided by this Court under the FAA so holds. The Court of Appeal simply followed that settled law. It concluded that forcing the parties to arbitrate under federal, not state, rules when they had agreed to arbitrate under state, not federal, rules would turn the FAA upside down. That is certainly right. (Part IV A, below.)

Volt's complaint that the Court of Appeal misinterpreted the contract presents a state, not federal, question. Volt's argument is also wrong. The agreement provides that it shall be governed "by the law of the

place where the project is located." The court interpreted the agreement to mean that California law, the place where the project was located, governs. That is what it says on its face. Volt argues that the agreement really means "California law plus all laws of the federal government that would otherwise apply." That is not what it says on its face.

California law provides that the words of a contract are to be understood in "their ordinary and popular sense, rather than their strict legal meaning," and according to local "usage." Ordinary people in California use the words "law of the place where the project is located" to mean law of the state where the project is located. They do not use those words to mean law of the state, plus "all laws of the federal government that would otherwise apply . . . ." The Court of Appeal had "no doubt" about that, and this Court, with great respect, is not in a position to doubt it. Part IV B, below.

Nor should it. Volt's arguments that the contract means what ordinary people would not take it to mean are contrived, and make no common sense. Volt points to the technical "literal terms" of the contract, but popular usage, not literal accuracy, is the test. Volt points to "basic tenets" of federal jurisprudence, but popular usage, not jurisprudence, is still the test. Volt invites the same words in the same phrase of the same contract to mean different things at the same time, but ordinary people do not use words that way. In sum, there is no ground or occasion for this Court to determine that the words "law of the

place where the project is located" mean what Volt says they mean in California, or anywhere else. Part IV B, below.

Volt points out that the FAA contains no counterpart provision to § 1281.2(c), and that an FAA procedural rule compels arbitration notwithstanding the duplicative litigation and inconsistent judgments an order to compel might cause. Volt asserts that there is "no serious controversy" that, absent the parties' agreement, that FAA rule would obtain in this state court proceeding.

This Court need not reach that assertion, because the parties' agreement is not absent, and it is valid. But if the Court does reach it, the assertion is false. The "substantive law" of the FAA does apply in federal and state court; but this Court has expressly not held that §§ 3 and 4 of the FAA, its procedural sections, apply in state court, let alone that its rule compelling-arbitration-notwithstanding-duplicative-litigation-and-inconsistent-judgments does.

There are three very good reasons to hold that they do not. First, §§ 3 and 4 apply by their terms to federal, not state court, proceedings. Second, the FAA's legislative history shows that Congress meant what it said. Third, the procedural business of state courts is ordinarily the business of state courts, and federal law generally takes state courts as it finds them. No federal interest demands that a state court compel piecemeal litigation or effect inconsistent judgments contrary to state law. Part IV C, below.

The appeal should be dismissed or the judgment affirmed. Part V, below.

#### IV. ARGUMENT

##### A. THE FAA ENFORCES AGREEMENTS IN ACCORDANCE WITH THEIR TERMS, NO MORE, NO LESS.

The Court of Appeal interpreted the parties' agreement under state law, and found that the parties had agreed that the "laws of California, of which CCP § 1281.2 is certainly a part, are to govern the contract." (Dec. J.A. 65) The Superior Court thus properly applied CCP § 1281.2(c) in accordance with the agreement, issued a stay under it, and so enforced the agreement in accordance with its terms. See pp. 21-22, above.

The question is whether the FAA prohibits a state court from applying state rules to an arbitration agreement in accordance with the agreement's terms. The answer is no. Federal law preempts state law which "stands as an obstacle to" – that is, conflicts with the accomplishment of – the purpose of federal law. *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941).<sup>18</sup> A state court order enforcing an arbitration agreement in accordance with its terms does not conflict with the FAA or any other federal law. Rather, it follows federal law and effects its purpose, exactly.

Arbitration is a matter of agreement. A court cannot force parties to arbitrate a dispute they have not agreed to arbitrate. They can agree to arbitrate in any way they

---

<sup>18</sup> Federal law may also preempt state law expressly or by occupying the field. *Michigan Canners & Freezers Assn. v. Agricultural Marketing & Bargaining Board*, 467 U.S. 461, 469 (1984). The FAA contains no express preemption provision, and it does not occupy the field of arbitration law. See, e.g., *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956). No one claims otherwise.



want; thus they can agree to arbitrate some disputes and not all, or in some circumstances and not all, or not at all.

Nothing in the FAA changes any of that or takes those rights away. Again, the contrary is so. The FAA is meant to enforce the parties' agreement, whatever it is, no less and no more than it is. Its purpose is to "make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 404 n.12 (1967); H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924); see pp. 2-3, above.

*Prima Paint* is the seminal case, and illustrates the point. It held that a claim for fraudulent inducement was arbitrable where the parties had agreed that it was. It also observed that that claim would not be arbitrable "where the parties otherwise intend." 388 U.S. at 402. No one so much as claimed that the parties were "not entirely free" to otherwise intend, and "so contract." 388 U.S. at 406.

Accordingly, the FAA makes arbitration agreements enforceable in accordance with their terms,<sup>19</sup> but only in accordance with their terms. Every case since *Prima Paint* so holds. Thus, the FAA preempts state laws which prohibit arbitration of disputes the parties have agreed to arbitrate. For example, the FAA preempts the California Corporations Code to the extent it prohibits arbitration of state franchise claims the parties had agreed to arbitrate; the Code could not be "applied to invalidate a contract for arbitration," and "to nullify a valid contract made by private parties. . . ." *Southland Corp.*, above, 465 U.S. at

<sup>19</sup> The FAA applies to agreements in interstate commerce and to maritime agreements, not all agreements. See 9 U.S.C. §§ 1-2.

6, 7. Again, the FAA preempts the California Labor Code to the extent it prohibits arbitration of wage claims the parties had agreed to arbitrate; the purpose of the FAA is to "enforce private agreements into which parties have entered. . . ." *Perry v. Thomas*, above, 107 S.Ct. at 2525-26 (citations omitted).

The converse is also true. The FAA does not "mandate the arbitration of all claims, but merely the enforcement – upon the motion of one of the parties – of privately negotiated arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, above, 470 U.S. at 219. The FAA likewise does not mandate what parties must arbitrate, or how or under what circumstances; private parties are free to limit the "scope" of their agreement as they see fit. See *Mitsubishi*, above, 473 U.S. at 628 (citing *Prima Paint*, above). The Court's job, to end at the beginning, is to enforce the parties' agreement in accordance with its terms, no more, no less. *Accord Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit"); *Moses H. Cone*, above, 460 U.S. at 20 (federal court should compel arbitration even if that causes piecemeal litigation "where necessary to give effect to an arbitration agreement"); *Shearson Amer. Express, Inc. v. McMahon*, \_\_\_ U.S. \_\_\_, 107 S. Ct. 2332, 2346 (1987) (holding parties "to their bargain" to arbitrate Exchange Act and RICO claims); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974) (holding that "the agreement of the parties . . . to arbitrate any dispute [including 10b-5 claim] arising out of their international commercial transaction is to be respected and enforced by the federal courts").



The Court of Appeal did not violate those basic principles of federal arbitration law.<sup>20</sup> It set them forth, correctly, embraced them, followed them, and so enforced the parties' agreement in accordance with its terms. It held "that the parties are at liberty to choose the terms under which they will arbitrate, and such a choice will not run afoul of the FAA." (Dec. J.A. 72) It concluded that it would violate those basic principles of arbitration law were the Court not to enforce the parties' agreement, including its choice-of-law clause, in accordance with its terms (Dec. J.A. 72-73):

"Were the federal rules to be imposed in this case to override the parties' choice of law, the effect would be to force the parties to arbitrate where they agreed not to arbitrate. This result is not only inimical to the policies underlying state and federal arbitration law, . . . it also violates basic principles of contract law."

*Accord Chan v. Drexel Burnham Lambert, Inc.*, above, 178 Cal. App. 3d at 640, 645:

<sup>20</sup> The Court observed that California law is exactly the same, (Dec. J.A. 71-72), as it is. See, e.g., *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal. App. 3d 19, 32 (1977):

"Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

*Accord, O'Malley v. Wilshire Oil Co.*, 59 Cal. 2d 482, 496 (1963); *Chan v. Drexel Burnham Lambert, Inc.*, 178 Cal. App. 3d 632, 640, 645 (1986). California indeed has an "historical friendliness . . . to the institution of arbitration." See *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 132 (1973) (quoting *Feldman, Arbitration Modernized - The New California Arbitration Act*, 34 S. Cal. L. Rev. 413, 414 (1961)).

"Arbitration is recognized as a matter of contract, and a party cannot be forced to arbitrate something in the absence of an agreement to do so." (*Vespe Contracting Co. v. Anvan Corporation* (E.D. Pa. 1975) (399 F. Supp. 516, 520.) The [federal] Act " 'does not dictate that we should disregard parties' contractual agreements . . . outlining the boundaries of the areas intended to be arbitrable.' " (*Pas-Ebs v. Group Health, Inc.* (S.D.N.Y. 1977) 442 F. Supp. 937, 940), and there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate. (*Delta Lines, Inc. v. International Brotherhood of Teamsters* (1977) 66 Cal. App. 3d 960, 966 [136 Cal. Rptr. 345])."

That is the heart of the Court of Appeal's decision, but Volt does not address it. Nor does Volt dispute those basic principles, or contend that they do not apply here. Indeed, to the extent Volt says anything on the point it proves the point. It says that notwithstanding the FAA, Stanford could have dealt with "the possibility of simultaneous disputes with the several participants in the project [not parties to the arbitration agreement] and the consequent problem of duplicative litigation"; all Stanford need have done, Volt states, is to insert "a proviso expressly excusing it from its duty to arbitrate in the event of such disputes with non-parties to the agreement." (O. Br. 83-84.) The Court of Appeal held that that, in effect, is exactly what Stanford and Volt agreed to do.

"If the parties here had expressly stated in their agreement that they wished to arbitrate only those disputes between themselves which did not involve third parties not bound by the arbitration agreement, this provision would presumably be enforceable. In our view they accomplished the same thing by choosing to be governed by California law, thus incorporating the

*California rules of civil procedure governing arbitration agreements.*" (Dec. J.A. 72; Emphasis added.)<sup>21</sup>

Volt's sole answer is this: Assuming the agreement means what the Court of Appeal found it to mean, Volt says, enforcing it in accordance with its terms would violate "a fundamental public policy of the jurisdiction [the United States] whose law would apply" but for the agreement. (O. Br. 97) That "fundamental policy," Volt goes on, is "a liberal federal policy favoring arbitration agreements." (O. Br. 102; *see generally* O. Br. 96-106.) That proposition disproves itself. One does not violate a policy favoring arbitration agreements by enforcing arbitration agreements in accordance with their terms. One does violate the law requiring enforcement of arbitration agreements in accordance with their terms by not enforcing them in accordance with their terms.<sup>22</sup>

<sup>21</sup> *Moses H. Cone*, above, holds that a federal court should compel arbitration even if that causes piecemeal litigation "where necessary to give effect to the arbitration agreement." 460 U.S. at 20. Even if that rule were applicable in state court proceedings (it is not – see Argument, Part IV C), it would not be applicable here; a rule requiring piecemeal litigation would have been at odds with these parties' agreement, not "necessary to give effect" to it.

<sup>22</sup> The liberal federal policy favoring arbitration agreements is simply "at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi*, above, 473 U.S. at 625.

Volt relies on *The Kensington*, 183 U.S. 263 (1902), *Mitsubishi*, above, and *Scherk v. Alberto-Culver Corp.*, above. Volt is way off target. Those cases hold that parties cannot by agreement avoid the substantive commands of statutes that apply

(Continued on following page)

We turn to the Court of Appeal's interpretation of the agreement.

## B. THE CONTRACT MEANT WHAT THE TRIAL COURT AND COURT OF APPEAL FOUND IT MEANT.

Volt does not attack the settled and controlling principles on which the Court of Appeal's decision is based. Instead, it complains that the Court of Appeal misinterpreted a clause in the parties' contract. That clause, Volt says, "must be interpreted" to provide that it is to be governed by state law plus "all laws of the federal government that would otherwise apply. . . ." (O. Br. 66, 75).

Volt is way off base. First, what the clause means is a state, not federal question. *See* pp. 5-16, above, and 35-37, below. Second, Volt is wrong on the merits, should this Court reach them.

The agreement provided that it "shall be governed by the law of the place where the project is located." The place the project was located was California, and there is no place called federal. Therefore, the contract means that California law, the place the project was located, governs. The trial court and Court of Appeal had "no doubt" about that (Dec. J.A. 66), and the parties, who contracted in California, must be taken to have known it; the year

(Continued from previous page)

regardless of agreements. Thus a carrier cannot evade its statutory liability by agreement (*Kensington*), an automotive company cannot avoid the antitrust laws by agreement (*Mitsubishi*), and a seller (perhaps) cannot avoid liability under 10b-5 by agreement (*Scherk*). But here the FAA imposes no obligations regardless of agreement; it makes agreements to arbitrate enforceable in accordance with their terms, no more, no less.



before their "agreement was forged," the California Court of Appeal so held. *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co.*, 140 Cal. App. 3d 251 (1983) (Dec. J.A. 67).<sup>23</sup>

The Court of Appeal's decision and *Garden Grove* hardly stand alone. The Court of Appeal pointed out that "[c]ourts in other states faced with identical language have reached the same result we do here," citing *Standard Co. v. Elliott Constr. Co.*, 363 So. 2d 671 (La. 1978), *Eric A. Carlstrom Constr. Co. v. Independent School Dist. No. 77*, 256 N.W. 2d 479 (Minn. 1977), and *Lane-Tahoe, Inc. v. Kindred Constr. Co.*, 536 P.2d 491 (Nev. 1975). Volt agrees that *Standard* reached that result, but objects that *Carlstrom* and *Lane-Tahoe* have no "bearing"; "the possible application of federal law" was not at issue there, Volt says. (O. Br. 90 n.) Volt misses the point. *Carlstrom* and *Lane-Tahoe* both hold that a clause identical to the one at issue here plainly means that arbitration is to proceed in accordance with the laws of the state in which the project is located. 256 N.W. 2d at 483; 536 P. 2d at 493. That is the point.

*Carlstrom* and *Lane-Tahoe* are in accord with a large body of case law from around the country. That body holds that the "law of the place where the project is located" plainly means the law of the state where the

<sup>23</sup> Volt points to *Liddington v. The Energy Group*, 192 Cal. App. 3d 1520 (1987) (O. Br. 70, 92 n.), which interpreted a contract Volt's way. But *Liddington* postdated the parties' agreement, did not discuss the reason for its holding, and did not reach the centerpiece of the Court of Appeal's decision here. (Dec. J.A. 75-76) Volt also points to *Ford v. Shearson Lehman Amer. Express Co.*, 180 Cal. App. 3d 1011 (1986), but *Ford* did not discuss the contract interpretation question involved here.

project is located. *McCarthy Bros. Const. Co. v. Pierce*, 832 F.2d 463, 466 n.4 (8th Cir. 1987); *Pickens v. Hess*, 573 F.2d 380, 384 (6th Cir. 1978); *Safer v. Perper*, 569 F.2d 87, 91 (D.C. Cir. 1977); *Starr Elec. Co., Inc. v. Basic Const. Co.*, 586 F. Supp. 964, 968 (M.D.N.C. 1982); *United States Fidel. & G. Co. v. Bangor Area Jt. Sch. Auth.*, 355 F. Supp. 913, 914 (E.D. Penn. 1973); *Standard Co. v. Elliott Const. Co., Inc.*, 363 So. 2d 671 (La. 1978); *Coover Const. Co. v. Johnson*, No. 83 AP-235, slip op. (Ohio Ct. App. August 4, 1983).<sup>24</sup>

*Carlstrom* and *Lane-Tahoe* are also in accord with a long list of federal statutes. They plainly use "law of the place [of a transaction]" to mean the law of the state where the transaction occurs. See 28 U.S.C. § 1346(b) (providing that the United States is liable under the Federal Tort Claims Act "in accordance with the law of the place where the act or omission occurred"; law of the place means state law as to damages, *Richards v. United States*, 369 U.S. 1, 11 (1962); *Stoleson v. United States*, 708 F.2d 1217 (7th Cir. 1983); *Smith v. Pena*, 621 F.2d 873 (7th Cir. 1980); *Southern Pac. Transp. Co. v. United States*, 471 F. Supp. 1186 (E.D. Cal. 1979); *United States v. Sutro*, 235 F.2d 499 (9th Cir. 1956), and state conflict-of-law principles, see, e.g., *Richards*, above, 369 U.S. at 11; *Ducey v. United States*, 713 F.2d 504, 508 n.2 (9th Cir. 1983); *Gelley v. Astra Pharmaceutical Products, Inc.*, 610 F.2d 558, 560 (9th Cir. 1979); *J.W. Petersen Coal & Oil Co. v. United States*, 323 F. Supp. 1198, 1205 (N.D. Ill. 1970); *Gowdy v. United States*, 412 F.2d 525, 527 (6th Cir. 1969)); 28 U.S.C. § 2674 (limiting liability of United States to compensatory damages in

<sup>24</sup> Those cases do not deal with a federal-versus-state-law question. They demonstrate the point *Carlstrom* and *Lane-Tahoe* demonstrate - "law of the place where the project is located" is commonly used to mean state law.

wrongful death cases where "the law of the place where the act or omission complained of occurred" provides for punitive damages only; law of the place means state law, *Bowen v. United States*, 570 F.2d 1311 (7th Cir. 1978)); 28 U.S.C. § 2672 (providing for settlement of claims against the federal government where the United States "would be liable to the claimant in accordance with the law of the place where the act or omission occurred"; law of the place means state law governs effect of release, *Robinson v. United States*, 408 F. Supp. 132, 136 (N.D. Ill. 1976)); 38 U.S.C. § 103(c) (providing that "whether or not a person is or was the spouse of a veteran" is to be determined "according to the law of the place where the parties resided"; that means state law on its face, where parties resided in a state); 28 U.S.C. § 534(a)(3) (providing that the Attorney General shall acquire information to locate any missing person, "including an unemancipated person as defined by the laws of the place of residence of such person"; that means state law on its face, where person resides in state); 18 U.S.C. § 1821 (prohibiting, in part, the interstate transportation of dentures without the authorization of a person "licensed to practice dentistry under the laws of the place into which such denture is sent or brought"; that means state law on its face, where the place is a state.) See also Uniform Code of Military Justice, 28 U.S.C. § 849(c), which makes it explicit that the laws of the place and the laws of the United States are different:

Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths. (Emphasis added.)

Volt cites cases that interpret "place" its way, and we will deal with them. (See pp. 41-42, below.) But the purpose of the exercise is not to add up cases and statutes on

either side. The cases and statutes we cite just reflect what real people mean by the ordinary words "place where something is located." The purpose of the exercise was and is to determine what these real people – Volt points out they were "business executives," not lawyers (O. Br. 83) – meant by those ordinary words here. Certainly that was the Court of Appeal's task.

California law provides that "the words of a contract are to be understood in their ordinary and popular sense, rather than their strict legal meaning . . .," and in accordance with the "usage" of the "place" where the project is to be performed. Cal. Civ. Code §§ 1644, 1646.<sup>25</sup> Those rules are well known and settled, and the case law follows them: "The terms of the contract are to be understood in their ordinary and popular sense and as a man of average intelligence and experience would understand them." *Morton v. Travelers Indemnity Co.*, 121 Cal. App. 2d 855, 858 (1953) quoting *Burr v. Western States Life Ins. Co.*, 211 Cal. 568, 575 (1931). "The terms of a writing are presumed to have been used in their primary and general acceptance." *Jenne v. Jenne*, 192 Cal. App. 2d 827, 830 (1961). "The common or usual meaning will be ascribed to words used in a contract unless the context or circumstances indicate that in a particular case a special meaning should be attached to them." *Reliance Life Ins. Co. v. Jaffe*, 121 Cal. App. 2d 241, 245 (1953).

---

<sup>25</sup> California Civil Code § 1644 goes on to provide:

"[U]nless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

There was no showing that the parties used the word "place" in a technical sense; they were, again, businessmen, not lawyers.



Volt apparently invites this Court to reinterpret the contract (pp. 5-6, above), but it is unclear under what principle and rules of contract interpretation Volt asks the Court to do it. There is no general federal common law of contracts; *Swift v. Tyson* is long gone and unmourned. See p. 6, above. It would, at the least, be startling were this Court to cause *Swift* to be born again, or to undertake to interpret this contract under it or some mutant of it. But if the Court did, presumably it would apply the same common sense rules of interpretation that obtain in California. For it would make no sense to interpret popular words in an unpopular way, or to interpret words used in one place in accordance with the usage of some other place.

Ordinary people in California use the words "law of the place where the project is located" to mean law of the state where the project is located. That seems natural. Ordinary people in California do not use those words to mean law of the state, plus "all laws of the federal government that would otherwise apply. . . ." (O. Br. 66, 75) That seems unnatural. Perhaps that local usage is parochial, even uninformed. If so, it is regrettable, but it is the fact. The Court of Appeal had "no doubt" about that, and found Volt's interpretation to the contrary "unreasonable." This Court, with great respect, is not in a position to doubt it, nor should it. States undertake to "deal with the whole gamut of problems cast up out of the flux of everyday life in the state," in part because, being where the flux is, they are in a position to deal with it. See Hart, above, 54 Colum. L. Rev. at 491.

Volt worries that the Court of Appeal's interpretation of the contract makes the contract "dispositive of an issue of federal preemption." (O. Br. 70) But it does not; Volt need not worry. If federal law preempts California law regardless what the parties agreed to, it does and it

applies. If federal law prohibits these parties from making an agreement to arbitrate in accordance with the rules set forth in California law, it does and the agreement falls. Obviously parties cannot agree to do what federal law prohibits, or be free of duties federal law imposes without regard to what they agree to. See pp. 30-31 n.22, above. But federal law does not prohibit the agreement these parties made or impose duties on them they did not discharge; federal law provides that parties' agreements to arbitrate - whatever their terms - are to be enforced according to their terms, no more, no less. The Court of Appeal followed that law. Part IV A, above.

We turn to Volt's six contract interpretation contentions.

**1. The Argument that the Court of Appeal's Interpretation of the Contract "Is Discordant With the Common Understanding of the Function" of Choice-Of-Law Clauses.**

Volt says that choice-of-law clauses do not (a) "encompass federal-state relations" or (b) "federal supremacy." (O. Br. 66-73) But as to (a) they do, and it does not matter what one calls the clause. See pp. 7-8, above. As to (b), this clause does not undo federal supremacy, and of course cannot. See pp. 30-31, above.

Volt cites no case that holds what it says, but refers to "sub silentio" decisions. (O. Br. 68, 72) A silent decision announces no rule.

**2. The Argument That The "Literal Terms of the Parties' Contract" Mean What Volt Argues They Mean.**

Volt says that the "only literally correct interpretation of . . . 'law of the place where the project is located' . . . is



that it constitutes a collective reference to the laws" of the City, the County, the State and the United States, "within whose boundaries the project was in fact situated." (O. Br. 75) Perhaps that is an available interpretation, technically, although one ought to add the laws of gravity, physics, nations, and so on to be complete. But words in a contract are to be given their "popular," not "technical," meaning (Cal. Civ. Code § 1644, pp. 35-36, above), and Volt's is hardly the popular meaning.

Volt adds that unless the clause is interpreted its way, the provisions of the contract requiring the contractor to pay "all taxes . . . applicable to the contractor's work" and to comply with "all applicable laws . . . bearing on . . . safety" would mean California taxes and California safety laws only. (O. Br. 76-77) That is nonsense. California law governs the agreement, and requires that words be given their plain meaning. All applicable taxes and safety laws plainly means all applicable taxes and safety laws.<sup>26</sup>

### 3. The Argument That "Basic Tenets of Federalism Dictate" That The Agreement Be Interpreted Volt's Way.

Volt advises that "the basic tenets of American federalism" hold that "federal law constitutes an integral part of the law of every state and of every 'place' within the

<sup>26</sup> Also the tax and safety laws "apply" regardless of agreement. Therefore, the parties could not have contracted out of liability for them if they had wanted to. The FAA, by contrast, imposes no obligation absent agreement, and only makes agreements enforceable in accordance with their terms.

federal union," citing, among other things,<sup>27</sup> *Federalist*, Nos. 16, 27. (O. Br. 77) That may well be so as a matter of jurisprudence. But the question, "quintessential or not" (O. Br. 49), is not jurisprudential. The question is what ordinary people – who do not travel with the *Federalist* – mean by ordinary words.

Volt also points to *Fidelity Federal S & L Assn. v. de la Cuesta*, 458 U.S. 141 (1982) (O. Br. 80). *Fidelity* did hold that the phrase "law of the jurisdiction in which the property is located" meant state and federal law, because "the 'law of the jurisdiction' includes federal as well as state laws." 458 U.S. at 157 n.12. The *Fidelity* clause and contract are different from this one. *Fidelity's* clause used the technical word "jurisdiction" in the abstract; this clause uses the common, physical word "place." Moreover, the *Fidelity* clause came from a uniform mortgage instrument issued by a federal agency which had expressly mandated that federal law was to preempt state law prohibiting due-on-sale clauses (458 U.S. at 147, 157 n.12); it would have been self-defeating to promulgate a uniform instrument containing a clause intended to undo that express mandate, and this Court found that the purpose of the clause was otherwise. *Ibid.*

<sup>27</sup> Volt's cases (O. Br. 78-80) merely stands for the proposition that state courts with concurrent jurisdiction over federal rights must enforce them. See *Claflin v. Houseman*, 93 U.S. 130 (1876) (concurrent jurisdiction permissible); *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912) (Connecticut courts required to enforce FELA claim); *Testa v. Katt*, 330 U.S. 386 (1947) (Rhode Island court required to enforce treble damage claim under Emergency Price Control Act); *Hauenstein v. Lynham*, 100 U.S. 483 (1880) (federal treaty preempts state law).

In sum, *Fidelity* dealt with the contract before it. It did not lay down a "specialized rule" of federal common law requiring that all clauses the same as, or more or less like, its clause, be interpreted the same as its clause in all private contracts in all places. The question remains, what did the parties mean here? The Court of Appeal found what they meant and, besides that being a state question, the Court was right. See pp. 5-16, above.

#### 4. The Argument That "The Only Evidence In The Record Regarding The Parties' Intent . . . Suggests" That Volt's Interpretation Is Right.

Volt says that the "clause might be susceptible to the interpretation placed upon it by the Court of Appeal if it clearly appeared from the evidence" that that is what the parties meant. (O. Br. 81-82) But, Volt goes on, "what little evidence exists on this subject suggests" that the parties' intent "was precisely the opposite of the one attributed to them by the" Court of Appeal. (O. Br. 82)

Volt's "evidence" is its announcement that "Stanford could easily have dealt with this problem [of duplicative litigation] by inserting a proviso expressly excusing it from its duty to arbitrate in the event of . . . disputes with non-parties to the agreement." (O. Br. 83-84) But the Court of Appeal found that that is what the parties, by their choice-of-law clause, in effect did. See pp. 29-30, above.

Volt's argument proves nothing about intent. It does prove: (1) That the FAA permits the parties to limit the scope of their agreement to arbitrate in the way the Court of Appeal found they in effect did (see pp. 26-30, above); and (2) That the question of intent turns on "evidence," not the Constitution, and therefore presents no federal question.

#### 5. The Argument That "The Overwhelming Weight of Authority . . . Supports" Volt's Interpretation.

Volt claims that an "imposing panoply" of case law supports its interpretation of the parties' contract, and a "meager minority" supports the Court of Appeal's. (O. Br. 90)

Volt's numbers are, to start with, wrong. The "panoply" is made up of three decisions of this Court and 21 decisions of lower courts. Of the three decisions of this Court, one, *Fidelity*, is discussed in subsection 3, above; it does not decide this contract interpretation question. The other two, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, and *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, do not address the issue at all; they are what Volt calls "sub silentio" rulings (O. Br. 86), and their silence proves nothing.

Of the 21 lower court decisions, eleven (O. Br. 88-89) are also "sub silentio" rulings, and their silence proves nothing either. That leaves ten. Of the ten, two, *Episcopal Housing Corp. v. Federal Ins. Co.*, 239 S.E. 2d 647, 650 n.1 (S.C. 1977) and *Huber, Hunt & Nichols v. Architectural Stone Co.*, 625 F.2d 22, 25 n.8 (5th Cir. 1980), are based on Volt's literal meaning theory (O. Br. 87); but the purpose is to determine what the parties meant, not some literal meaning. See pp. 31-37, above.

That leaves eight. Of the eight, four, *Burke County Public Schools v. The Shaver P'ship*, 279 S.E. 2d 816, 823, 825 (N.C. 1981); *Mamlin v. Susan Thomas, Inc.*, 490 S.W. 2d 634, 637 (Tex.Civ.App. 1973); *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1270 (7th Cir. 1976); and *Tennessee River Pulp & Paper Co. v. Eichleay Corp.*, 637 S.W. 2d 853, 857 (Tenn. 1982), are based on Volt's jurisprudential theory (O. Br. 88); but jurisprudence is not the question here. See pp. 5-16, above.



That leaves the last four, *Paul Allison, Inc. v. Minikin Storage, Inc.*, 486 F. Supp. 1, 3 (D. Neb. 1979); *State ex rel. St. Joseph Light & Power Co. v. Donelson*, 631 S.W. 2d 887, 891-92 (Mo.App. 1982); *Mesa Operating Ltd. P'ship, v. Louisiana Intra State Gas Corp.*, 797 F.2d 238, 243-44 (5th Cir. 1986); *Cone Mills Corp. v. August F. Nielsen Co.*, 455 N.Y.S. 2d 625, 627 (N.Y. Sup. Ct. 1982).<sup>28</sup> They are based on Volt's theory that enforcement of the parties' agreement in accordance with its terms violates the FAA, which requires Courts to enforce arbitration agreements in accordance with their terms (O. Br. 88-89); that theory stands the FAA upside down. See p. 30, above.

On the other side. Stanford's authorities are hardly a "meager minority." (See pp. 32-34, above.) They are, perhaps, a major mass. But, again, names do not matter. The purpose of the inquiry is not to add up authorities on either side and see which stack is higher. The purpose is to determine what these parties meant by the ordinary words they used in their contract. That remains a state question and the Court of Appeal's answer to it remains right.

**6. The Argument That The Choice-Of-Law Clause Must Be Generously Construed Because Arbitration Agreements Must Be.**

Volt says last, that federal law requires that "any ambiguities in arbitration agreements within the coverage of the Act should generally be resolved in such a way as to favor arbitration of the parties' dispute." (O. Br. 94) But: (1) The choice-of-law clause was not ambiguous here; the Court of Appeal had "no doubt" about it. (2)

<sup>28</sup> Volt cites *Commonwealth Edison Co. v. Gulf Oil Corp.*, above, and *Huber, Hunt & Nichols, Inc. v. Architectural Stone Corp.*, above, a second time for this proposition as well. (O. Br. 88-89)

That federal rule of interpretation applies to "arbitration agreements" in a contract, not other provisions in a contract, and could not. Otherwise the same provision in the same contract could have different state and federal meanings at the same time. See pp. 12-15, above. (3) That federal rule of interpretation could not apply to this arbitration neutral choice-of-law provision in this contract. Otherwise the provision would have to mean state law when it is more favorable to arbitration and federal law when it is not. So the clause would have different meanings at the same time on that score as well. See pp. 12-15, above.

The "generously construed" rule has no application here.

**CONCLUSION AS TO PART B**

The interpretation of the agreement is a state law question and the Court of Appeal's interpretation of it was right.

**C. SECTIONS 3 AND 4 OF THE FAA WOULD NOT APPLY IN THIS STATE COURT PROCEEDING, EVEN ABSENT THE PARTIES' AGREEMENT.**

Volt asserts that: (1) The FAA "contains no counterpart provisions" to CCP § 1281.2(c). (2) An FAA rule instead compels arbitration of a claim notwithstanding "the existence of . . . non-arbitrable third-party claims" and the duplicative litigation and inconsistent judgments an order to compel may, by reason of those claims, cause. (3) Absent these parties' choice-of-law agreement, there is "no serious controversy" that that FAA rule would obtain in this state court proceeding. (O. Br. 59, 61, 62-66)

The Court need not reach those assertions because the parties' agreement is not absent, it is valid (Part IV A), and the Court of Appeal properly interpreted it (Part IV B; a state question anyway). Should the Court reach them, however, we grant that assertions 1 and 2 are true. But assertion 3 is not without "serious controversy," at the least.

Sections 1 and 2 of the FAA make valid and enforceable "written provisions" to arbitrate in "maritime" contracts and contracts "involving commerce." Those sections are the FAA's "substantive" provisions. See *Southland Corp.*, above, 465 U.S. at 16 n.10. Section 3 provides for stays of litigation while arbitration proceeds, and § 4 provides for orders compelling arbitration where one party refuses to arbitrate. Those sections are procedural, and they do not by their terms apply to proceedings in state court. To the contrary, § 3 applies by its terms to proceedings "brought in any of the courts of the United States" and § 4 to proceedings in "any United States district court."<sup>29</sup> Section 4 also refers, twice, to the "Federal Rules of Civil Procedure," and those Rules do not apply in state courts. Volt's assertion that the rule compelling arbitration-regardless-of-duplicative-litigation-and-inconsistent-judgment applies in state court assumes the premise that §§ 3 and 4 apply in state court. So does Volt's conclusion that, absent the parties' agreement, its "petition to compel" would have to have been granted by this state court (O. Br. 65); § 4, again, provides for the granting of petitions to compel.

<sup>29</sup> There is no difference between "courts of the United States" and "United States district court," as used in §§ 3 and 4. See *Southland Corp.*, above, 465 U.S. at 29 n.18 (O'Connor, J., dissenting)

This Court has never held that §§ 3 and 4 apply to proceedings in state court. and this case should not be the first. This is what the case law holds:

*Prima Paint v. Flood & Conklin*, above, 388 U.S. 395, is, again, the beginning.<sup>30</sup> It observed that § 3 requires a "federal court," to stay litigation, and that § 4 "provides a federal remedy." 388 U.S. at 400 (emphasis added). It held that "in passing upon a § 3 application" a "federal court may consider only issues relating to the making and performance of the agreement to arbitrate." 388 U.S. at 404 (emphasis added). It held further that the FAA was well within Congressional power to "prescribe how federal courts are to conduct themselves with respect to subject matter [interstate commerce and admiralty] areas over which Congress plainly has power to legislate." 388 U.S. at 405 (emphasis added).

Thus *Prima Paint* made clear that the FAA, and in particular §§ 3 and 4, dealt with federal court proceedings.<sup>31</sup> Sixteen years later, in 1983, *Moses H. Cone* held that the "effect of . . . [§ 2 of the FAA] is to create a body of federal substantive law of arbitrability." 460 U.S. at 24 (emphasis added). *Moses H. Cone* also said, in dictum, that that federal substantive law was applicable in "state or federal court." *Id.* *Moses H. Cone* laid down the rule, last, that a petition to compel arbitration should be granted notwithstanding the existence of non-arbitrable disputes between one party to the arbitration agreement and others; the "relevant federal law requires piecemeal

<sup>30</sup> *Bernhardt v. Polygraphic Co.*, above 350 U.S. 198, predates *Prima Paint*; it held that the FAA only applies to maritime contracts and contracts involving interstate commerce.

<sup>31</sup> The dissent pointed out that application of the FAA to state courts would "flout the intention of the framers of the Act." 388 U.S. at 424 (Black, J., dissenting).



resolution when necessary to give effect to an arbitration agreement," *Moses H. Cone* said. 460 U.S. at 20 (emphasis in original). *Moses H. Cone* arose in federal court, however, and it did not hold that that rule compelling arbitration-regardless-of-duplicative-litigation-and-inconsistent-judgments applied in state court.<sup>32</sup>

Thus the law appeared to be that the FAA's "federal substantive law" applied in federal and state court (*Moses H. Cone*); that the FAA in general and §§ 3 and 4 in particular applied in federal court (*Prima Paint*);<sup>33</sup> and that this Court had not held that the procedural provisions of the FAA, in particular §§ 3 and 4 and *Moses H. Cone's* piecemeal litigation rule, applied in state court. *Southland Corp.*, above, made clear that that was the law. *Southland Corp.* was the first state court case in the line to reach this Court. It affirmed *Moses H. Cone's* dictum that the "substantive law the . . . FAA created was applicable in state and federal court." 465 U.S. at 12. It also expressly did not "hold that §§ 3 and 4 of the . . . [FAA] apply to proceedings in state courts." 465 U.S. at 16 n.10. Rather, it indicated the opposite was so.

"Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to

<sup>32</sup> *Moses H. Cone* noted that "the state courts have almost unanimously recognized that the stay provision of § 3 applies to suits in state as well as federal courts, 460 U.S. at 26 n.34, but did not (and had no occasion to) decide that question. Since then, the Court expressly did not "hold that §§ 3 and 4 of the [FAA] . . . apply to proceedings in state courts." *Southland Corp.*, above, 465 U.S. at 16 n.10. See pp. 46-47, below.

<sup>33</sup> Subject to the *Bernhardt* maritime/interstate commerce limit.

compel arbitration. The Federal Rules do not apply in some state court proceedings." (Ibid.)

That is where the case law stands.<sup>34</sup> There is no reason for this Court to change it, much less hold that §§ 3 and 4 apply to state court proceedings, let alone hold that *Moses H. Cone's* rule compelling arbitration-regardless-of-duplicative-litigation-and-inconsistent-judgments does. There are three very good reasons to hold they do not.

First, §§ 3 and 4 by their terms apply to federal, not state court, proceedings. See pp. 43-46, above; *Southland Corp.*, above, 465 U.S. at 16 n.10.<sup>35</sup>

Second, the legislative history shows that Congress meant what it said. Right after the FAA was signed into law, the American Bar Association Committee that drafted it and pressed to pass it, summed it up this way:

<sup>34</sup> Post *Southland Corp.*, *Mitsubishi*, above, 473 U.S. 614, 626, which arose out of the federal courts, recited *Southland Corp.'s* "federal substantive law" rule. Volt advises (O. Br. 64-5 n.) that *Perry v. Thomas*, above, 107 S. Ct. 2520, also post *Southland Corp.*, "mooted" the issue that *Southland Corp.* did not resolve, but *Perry* did not. *Perry* arose out of the state courts, but it did not mention, much less purport to resolve, the *Southland Corp.* issue. In fact, *Perry's* holding was based on § 2, the substantive provision of the Act, not §§ 3 or 4. 107 S.Ct. at 2525-26.

<sup>35</sup> Other procedural provisions of the FAA also apply to federal court proceedings by their terms. See 9 U.S.C. § 7 ("United States court in and for the district" may compel attendance of witnesses); 9 U.S.C. § 9 (confirmation of award by "United States court in and for the district"); 9 U.S.C. § 10 (vacation of award by "United States court in and for the district"); 9 U.S.C. § 11 (modification or correction of award by "United States court in and for the district.")



"The statute establishes a procedure in the *Federal courts* for the enforcement of arbitration agreements . . . A Federal statute providing for the enforcement of arbitration agreements *does relate solely to procedure of the Federal courts*. . . ." Quoted in *Southland Corp.*, above, 465 U.S. at 26 (O'Connor, J., dissenting).

The full history is set forth in Justice O'Connor's dissent in *Southland Corp.* We do not mean to reargue the issue *Southland Corp.* decided: we agree that the FAA's substantive law applies in state courts. But the legislative history makes clear at the least that the FAA's procedural rules were meant to apply in federal court only, and not "by any flight of fancy to permit Congress to control proceedings in state courts." See 465 U.S. at 28 (O'Connor, J., dissenting).<sup>36</sup>

Third, the procedural business of state courts is ordinarily the business of state courts, and imposing federal procedural rules on them is, in general, at odds with our federal system. "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." *Hart*, 54 Colum. L. Rev. at 508; *Southland Corp.*, above, 465 U.S. at 32-33. (O'Connor, J., dissenting.) See also *Sun Oil Co. v. Wortman*, 56 U.S.L.W. 4601, 4603 (June 15, 1988) (forum state's application of its statute of limitation to claim arising in other state does not violate Full Faith and Credit Clause):

"Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it

<sup>36</sup> That phrase was directed to Congress' power to legislate under Article III, but, we submit, it also applies here.

follows that a State may apply its own procedural rules to actions litigated in its courts."<sup>37</sup>

No doubt the FAA makes arbitration agreements subject to it enforceable. We grant therefore that a state court cannot refuse to make available the procedural remedies that obtain in state court to enforce them. But it does not follow that a state court must issue an order to compel to enforce them when state law does not provide for orders to compel, but provides, for example, for injunctive relief. Nor does it follow that where, as here, state law does provide for an order to compel (CCP § 1281.2), a state

<sup>37</sup> The issue is not whether rules are "substantive" or "procedural," or outcome determinative, under *Erie R. Co. v. Tompkins*, above, 304 U.S. 64 and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). The issue is whether Congress intended FAA rules generally taken to be procedural to apply in state court proceedings. It did not. (See text.) FAA §§ 3 and 4 provide remedies, and remedies are generally taken to be procedural. See, e.g., *Sun Oil Co. v. Wortman*, above, 56 U.S.L.W. at 4604 ("remedies available" are "generally treated as procedural under conflicts law. . . .")

Notwithstanding that "matters respecting the remedy" are generally considered procedural, federal "procedural" rules may apply in state court where necessary to effect Congress' purpose. See *Central Vermont Ry. v. White*, 238 U.S. 507, 511-12 (1915) (burden of proof in FELA case); *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952) (state court cannot take factual question of fraud from jury in FELA case; "right to trial by jury is too substantial a part of the rights accorded by the Act" to permit State procedural rule to take it away). See generally *Hart & Wechsler*, *The Federal Courts and The Federal System*, 566-573 (2d ed. 1973). Applying FAA §§ 3 and 4 and the rule compelling arbitration-regardless-of-duplicative-litigation-and-inconsistent-judgments to these state court proceedings is not necessary to effect Congress' purpose. Rather, it would be contrary to the express terms of §§ 3 and 4 and to Congress' expressed intent to legislate in respect to federal court procedures only.

court must issue that order notwithstanding that state procedural law militates against it.

It would be particularly untoward if the FAA's procedural rules were held to forbid application of this state procedural law in this state court. This law's purpose is to avoid duplicative, piecemeal litigation and inconsistent judgments. Surely the FAA was not intended to force a state court to issue orders compelling piecemeal litigation and effecting inconsistent judgments in violation of state law. Why would Congress want to do that in 1925 or ever? See *Sun Oil v. Wortman*, above, 56 U.S.L.W. at 4605 (recognizing a "State's interests in regulating the workload of its court").

#### CONCLUSION AS TO PART C

The FAA would not foreclose application of CCP § 1281.2(c) in state court proceedings even absent the parties' agreement. But the agreement is not absent, and the Court need not reach the question.

#### V. CONCLUSION

This appeal should be dismissed or the judgment below affirmed, summarily or on full consideration.

Dated: July 15, 1988.

Respectfully submitted,

McCUTCHEN, DOYLE, BROWN

& ENERSEN

DAVID M. HEILBRON

(Counsel of Record)

LESLIE G. LANDAU

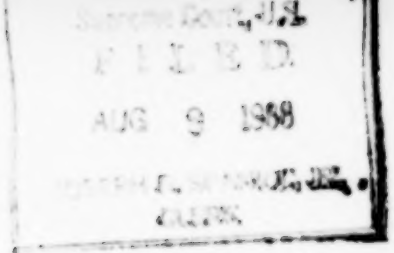
STEPHEN L. GODCHAUX

*Counsel for Appellee*

*The Board of Trustees of the*

*Leland Stanford Junior University*

8  
No. 87-1318



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

---

VOLT INFORMATION SCIENCES, INC.,  
Appellant,

vs.

BOARD OF TRUSTEES OF LELAND STANFORD  
JUNIOR UNIVERSITY, Appellee.

---

ON APPEAL FROM THE  
COURT OF APPEAL OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

---

APPELLANT'S REPLY BRIEF

JAMES E. HARRINGTON  
(Counsel of Record)  
ROBERT B. THUM  
DEANNE M. TULLY  
PETTIT & MARTIN  
101 CALIFORNIA STREET  
SAN FRANCISCO, CA 94111  
PHONE: (415) 434-4000

COUNSEL FOR APPELLANT

LIST OF AFFILIATED COMPANIES  
(Rule 28.1)

Appellant Volt Information Sciences, Inc., is a publicly owned corporation, incorporated in the State of New York. Its subsidiaries (other than wholly owned subsidiaries and wholly owned subsidiaries of wholly owned subsidiaries) are the following: Autologic, Inc., a California corporation; Long Beach Blueprint Company, a California corporation; DataNational Corporation, a Pennsylvania corporation; and Courtnay's Pty., Ltd., an Australian corporation. Appellant is also a 50 per cent participant in the following joint ventures: UV Associates, a Missouri joint venture; Australian Directory Services, an Australian joint venture; VNM Directory Support Services, a Nevada joint venture; Pacific Volt Information Systems, a California joint venture; and UVA Company, a Georgia joint venture.



## TABLE OF CONTENTS

I. Introduction	1
II. Stanford's Argument Concerning the Scope of the Federal Rule Requiring "Generous Construction" of Arbitration Agreements	1
A. Contrary to Stanford's Argument, the Established Rule That Arbitration Agreements Should Be "Generously Construed" to Promote "the Federal Policy Favoring Arbitration" Must Necessarily Extend, Not Only to the Interpretation of the Arbitration Clause Itself, but Also to the Interpretation of Any Other Contractual Provision That Directly Determines the Arbitrability of the Parties' Dispute.	1
B. In Any Event, the Federal Rule of "Generous Construction" of Arbitration Agreements Provides Only One of the Numerous Alternative Grounds That Support Volt's Position on This Appeal, the Remainder of Which Have Been Largely Ignored by Stanford in Its Responsive Brief.	18
III. Stanford's Argument That This Case Should Be Reviewed by Certiorari Rather Than Appeal Is Without Merit and in Any Event Would Not Defeat the Court's Jurisdiction to Review the Court of Appeal's Judgment.	22
IV. Stanford's Contention to the Contrary Notwithstanding, There Is No Serious Doubt That the Federal Arbitration Act Would Preempt the Conflicting Prescriptions of California Law if the Choice-of-Law Clause in the Parties' Agreement Were Not Interpreted to Foreclose the Application of the Act to This Case.	28



V. Stanford's Argument About the Perceptions of "Ordinary People," to the Extent It Has Any Meaning at All, Is Basically Inaccurate.	43
VI. Conclusion	45

TABLE OF AUTHORITIES

Cases

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)	9-10
Allison v. Medicab Int'l., Inc., 597 P.2d 380 (Wash. 1979)	32
American Ry. Express Co. v. Levee, 263 U.S. 19 (1923)	39
Brown v. Western Ry. Co., 338 U.S. 294 (1949)	38, 39
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	25
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1923)	22-23, 24-26
Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985)	37, 41
Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359 (1952)	39
Felder v. Casey, U.S. , 56 USLW 4689 (June 22, 1988)	39-42
Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942)	39
Howard Elec. & Mech. Co. v. Frank Briscoe Co., 754 F.2d 847 (9th Cir. 1985)	17
International Longshoremens Assn. v. Davis, 476 U.S. 380 (1986)	26
Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)	23, 25

Liddington v. The Energy Group, 238 Cal.Rptr. 202 (Cal.App. 1987)	38
Liner v. Jafco, Inc., 375 U.S. 301 (1964)	39
Local 926, Int'l. Union of Opera- ting Engrs. v. Jones, 460 U.S. 669 (1983)	27
Main v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 136 Cal. Rptr. 378 (Cal.App. 1977)	32
McCarty v. McCarty, 453 U.S. 210 (1981)	23, 26
Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 469 U.S. 1127 (1985)	33
Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 666 S.W.2d 604 (Tex.App. 1984), cert. den. 469 U.S. 1127 (1985)	32
Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Melamed, 405 So. 2d 790 (Fla.App. 1981)	32
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1986)	1, 5, 6
Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	2, 4, 6, 7, 16, 31, 34, 35-37
Paine, Webber, Jackson & Curtis v. McNeal, 239 S.E.2d 401 (Ga. App. 1977)	32
Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983)	27

Perry v. Thomas, U.S. __, 107 S.Ct. 2520 (1987)	5,6,11-15
R.J. Reynolds Tobacco Co. v. Durham County, U.S. __, 107 S.Ct. 499 (1986)	23
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	27
South Dakota v. Neville, 459 U.S. 553 (1983)	21
Southland Corp. v. Keating, 455 U.S. 1 (1984)	5,6,29,30, 31,32,33,34
Standard Oil Co. v. Johnson, 316 U.S. 481 (1942)	21
Starr Elec. Co. v. Basic Constr. Co., 586 F.Supp. 964 (M.D.N.C. 1982)	17
State Tax Comm. v. van Cott, 306 U.S. 511 (1939)	21
St. Louis S.W. R.R. Co. v. Dick- erson, 470 U.S. 409 (1985)	39
St. Martin Lutheran Church v. South Dakota, 451 U.S. 772 (1981)	21
Swift v. Tyson, 16 Pet. (41 U.S.) 1 (1842)	2
United Air Lines v. Mahin, 410 U.S. 623 (1973)	21

#### Statutes

9 U.S.C. §§1-4	passim
28 U.S.C. §1257(2)	22,24,26,29
28 U.S.C. §2103	27
29 U.S.C. §185(a)	9

42 U.S.C. §1983	40
Public Law 100-352, 102 Stat. 662	26
Calif.Code Civ.Proc. §1281.2(c)	passim

#### Treatises

Bator et al., Hart & Wechsler's The Federal Courts and the Federal System (3d ed. 1988)	21, 39
Stern et al., Supreme Court Practice (6th ed. 1986)	27

#### Articles

Hirshman, The Second Arbitration Trilogy: the Federalization of Arbitration Law, 71 U.Va.L.Rev. 1305 (1985)	32
---	----

#### Miscellaneous

The Federalist	43, 44
Quine, Word and Object (1960)	16



## I. Introduction

Most of the arguments advanced in Stanford's brief have been adequately anticipated in Volt's opening brief and therefore require no further response. There are only four exceptions to this generalization. These four arguments will be dealt with in the discussion that follows.

## II. Stanford's Argument Concerning the Scope of the Federal Rule Requiring "Generous Construction" of Arbitration Agreements

- A. Contrary to Stanford's Argument, the Established Rule That Arbitration Agreements Should Be "Generously Construed" to Promote "the Federal Policy Favoring Arbitration" Must Necessarily Extend, Not Only to the Interpretation of the Arbitration Clause Itself, but Also to the Interpretation of Any Other Contractual Provision That Directly Determines the Arbitrability of the Parties' Dispute.

In its opening brief, Volt pointed out that this Court has frequently held that arbitration agreements subject to the Federal Arbitration Act must be "generously construed" in such a way as to promote the "federal policy favoring arbitration" (Opening Brief, pp. 49-52, 92-96, citing, among other decisions, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1986), and Moses H. Cone

Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)). Volt invoked this established principle in support of its position both on the merits of this appeal and on the issue raised by Stanford's challenge to the Court's jurisdiction (id.). In the latter connection, Volt contended that the necessary application of this settled rule of federal law to the construction of the agreement at issue here constituted one of the several reasons why the court of appeal's interpretation of the choice-of-law clause in the agreement could not be said to rest upon an "adequate and independent state ground" (id., pp. 49-52).

In response to this contention, Stanford denies that this federal rule has any bearing upon this question of interpretation, and indeed asserts that its application in this context would produce an "amazing" expansion of the scope of federal common law tantamount to a resurrection of the discredited doctrine of Swift v. Tyson, 16 Pet. (41 U.S.) 1 (1842) (Stanford's Brief, pp. 12-13). Although Stanford apparently concedes that the rule would

apply to the construction of the arbitration clause itself in any agreement subject to the federal Act, it argues that the rule may not be applied to any provision of such an agreement other than the arbitration clause, even where, as in this case, the ultimate issue of the arbitrability of the parties' dispute depends directly upon the interpretation of another such provision of their contract (id.). Therefore, Stanford concludes, the doctrine has no application to the question of interpretation that is presented by this case, which concerns, not the arbitration clause itself, but rather the choice-of-law clause on which the court of appeal relied to relieve Stanford of its contractual duty to arbitrate (id.).

Stanford's effort to confine the coverage of the federal rule in this manner contravenes both the decisions of this Court enunciating the content of the rule and the policy considerations that ought to govern its practical application, both of which clearly establish that the rule in fact extends to all issues that directly determine the arbitrability of

any dispute subject to the federal Act, whether those issues concern the interpretation of the arbitration clause itself or some other provision or incident of the parties' contract. Thus, in its several formulations of the requirement of liberal construction of arbitration agreements, this Court has consistently described this rule as encompassing all "questions of arbitrability," wherever and however they might arise in the course of applying any of the provisions of the parties' contract. In its initial statement of this rule in its opinion in Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, for example, the Court phrased the rule as follows (id., 460 U.S. at 24-25; emphasis added):

"[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. ... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

This passage from the Cone opinion was quoted with approval in the Court's most recent exposition of this settled principle in its



opinion in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, where the Court additionally observed that, under this rule, all agreements subject to the federal Act must be "generously construed as to issues of arbitrability." Id., 473 U.S. at 626 (emphasis added). In none of the Court's opinions is there any indication that this policy of generous construction of arbitration agreements was intended to extend no further than to the language of the arbitration clause itself. Id.. See also Perry v. Thomas, \_\_ U.S. \_\_, 107 S.Ct. 2520, 2525 (1987); Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). In short, the Court has evidently gone to some lengths to make clear, in describing the terms of this federal policy, that its coverage is not in fact restricted in the way Stanford suggests, but rather extends to any "question of arbitrability" that may arise in any manner or under any provision of the parties' agreement in any case subject to the federal Act.

This conclusion regarding the broad scope of this doctrine is confirmed by the Court's



actual application of the doctrine in each of its prior decisions. In fact, all of these cases have involved some aspect of interpretation or application of the parties' agreement other than a construction of the terms of the arbitration clause itself. Thus, in three of the cases, the Court invoked the requirement of "generous construction" or the "federal policy favoring arbitration" for the purpose of disposing of a contention that an arbitration agreement containing a concededly unambiguous arbitration clause should nevertheless be denied enforcement pursuant to some legal rule entirely extraneous to the parties' agreement - consisting in one case of an alleged federal policy exempting antitrust claims from arbitration and in the other two cases of state statutes creating various other kinds of exceptions to the duty to arbitrate. Perry v. Thomas, supra, 107 S.Ct. at 2525-27; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., supra, 473 U.S. at 625-27, 631; Southland Corp. v. Keating, supra, 465 U.S. at 10-11. In the fourth case, the rule of liberal construc-

tion was applied in rejecting both a claim of waiver and an argument identical to the one advanced by Stanford in this case to the effect that a party should be excused from his duty to arbitrate when he becomes involved in related litigation with non-parties to the arbitration agreement. Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, 460 U.S. at 19-20, 24-25.

Thus, the actual holdings of all of the Court's decisions on this issue, as well as the language of the Court's opinions, conclusively establishes that the rule requiring liberal construction of arbitration agreements extends to any issue directly affecting the duty to arbitrate, whether the issue involves interpretation of the language of an arbitration clause or some other aspect of the application of the parties' agreement. As they have thus been defined by the decisions of this Court, these policies are therefore certainly broad enough to encompass the particular issue of contractual interpretation that is presented in this case, which Stanford itself concedes is the exclusive and decisive determinant of its duty

to arbitrate its present dispute with Volt.

Finally, this same conclusion likewise emerges from a consideration of the untoward practical consequences of restricting the scope of the federal rule in the artificial fashion advocated by Stanford. As noted above, Stanford contends that this rule should apply only to the language of the particular clause of the parties' agreement that expressly provides for the arbitration of their disputes, and that it should have no application to any other clause of the agreement, even if another such clause would directly affect the issue of arbitrability - and indeed even if, as in this case, that clause would effectively override and nullify all of the duties imposed upon the parties by the arbitration clause (Stanford's Brief, pp. 12-13). Quite plainly, this artificially truncated version of the scope of the federal rule would constitute a classic exaltation of form over substance.

This very criticism of a similar proposed restriction on the preemptive scope of an analogous rule of federal law was recently expressed

by this Court in the course of an opinion defining the coverage of the federal substantive law governing labor contracts subject to §301 of the Labor Management Relations Act. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). The question presented in that case was whether federal law should govern, not only suits brought for breach of such contracts, but also tort actions brought pursuant to state laws conferring a right of action for the tort of "bad faith breach of contract." The Court gave an affirmative answer to this question, reversing the state court's ruling that the tort of bad faith breach was "independent" of the obligations imposed by the contract. Id., 471 U.S. at 210-15. Characterizing this as a merely formal distinction, the Court held that the logical dependence of the tort claim on an assessment of the scope of the defendant's contractual duties rendered this state-law claim subject to federal preemption. In explaining its holding to this effect, the Court said (id., 471 U.S. at 210-11):

"If the policies that animate §301 are to be given their proper range, ... the preemp-



tive effect of §301 must extend beyond suits alleging contract violations. ... [Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of §301 by relabeling their contract claims as claims for tortious breach of contract."

As in Lueck, supra, so in this case: to deny application of federal law to the interpretation of a contractual provision that directly determines the arbitrability of a dispute otherwise subject to the Federal Arbitration Act merely because that provision does not happen to appear in the particular clause of the contract entitled "Arbitration" would plainly "elevate form over substance" and substantially undermine "the policies that animate[d]" the enactment of that federal statute.\*

---

\* Of course, Volt is not suggesting, by its citation of the Lueck decision, that federal preemption should extend as broadly in the field of arbitration law as it does in the area of labor law, where this Court has decreed that every provision of a collective bargaining contract must be interpreted in accordance with a uniform federal law. Rather, the relevant lesson to be drawn from the holding (continued)



Stanford is unable to cite any authority directly supporting the contrived restriction on the coverage of the federal rule that it is proposing here. It seeks to derive some indirect support, however, from this Court's disposition of one of the ancillary issues that was presented in the recent case of Perry v. Thomas, supra. In that case, the appellee, who had unsuccessfully sought to avoid federal preemption of a California statute limiting the arbitrability of certain disputes, also propounded an alternative argument to the effect that some of the appellants "lacked standing" to enforce the arbitration agreement. The Court disposed of this latter argument by remanding it for determination by the state court of appeal, and in that connection characterized the argument as presenting merely "a

---

(footnote cont'd.) in Lueck is simply that, wherever the limits of federal preemption may ultimately be drawn, with respect to arbitration law as well as labor law, those limits should not be drawn in such a way as to "elevate form over substance." As the foregoing discussion has demonstrated, acceptance of Stanford's contention on this issue would obviously have precisely this sort of undesirable effect.

straightforward issue of contract interpretation." Id., 107 S.Ct. at 2527. Stanford contends that this action by the Court represented a holding to the effect that the issue presented by this argument was purely one of state law, and that the same result should follow by analogy with respect to the issue of interpretation that is presented in this case (Stanford's Brief, pp. 13-14).

This contention reflects an obvious misreading of the Court's ruling in Perry. While the Court did indeed remand the "standing" issue for determination by the state court, it emphatically did not hold, as Stanford asserts, that the issue should ultimately be resolved under state law rather than federal law. In fact, as Stanford itself later implicitly acknowledges, the Court went out of its way to indicate that it was not purporting to decide this question of the applicable law, inasmuch as it appended to its order of remand a footnote prescribing some of the standards that should be utilized by the state court to determine whether the "standing" issue should

eventually be decided under federal or state law. Id., 107 S.Ct. at 2527n.9. Thus, far from supporting Stanford's view that the federal rule at issue here is applicable only to the interpretation of the language of the arbitration clause, this aspect of the Perry decision actually supports precisely the opposite conclusion - namely, that there are indeed potential issues other than interpretation of the arbitration clause that may need to be resolved in exclusive accordance with the federal policies underlying the Arbitration Act.

As noted above, Stanford does obliquely acknowledge this evident contradiction in its argument, by going on to discuss the standards for determining the proper scope of federal preemption that were actually prescribed by the Court in the footnote to its Perry opinion (Stanford's Brief, pp. 14-15). The conclusion Stanford purports to reach in that discussion, however, is demonstrably erroneous, as the following analysis will establish.

In the footnote in Perry, the Court stated that, as a general matter, principles of state

law may properly be applied to the interpretation and enforcement of arbitration agreements under the federal Act only if those principles "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," and may not be so applied if they "take[] [their] meaning precisely from the fact that a contract to arbitrate is at issue." Id., 107 S.Ct. at 2527n.9. Asserting, without analysis, that the choice-of-law "principle" relied upon by the court of appeal in this case is one that "arose to govern ... contracts generally," Stanford concludes that this supposed rule of state law should survive federal preemption under the standard thus laid down in the Perry opinion (Stanford's Brief, p. 15).

This conclusion, however, reflects a wholly inaccurate characterization of the purported "principle" of state law that is at issue here. As Volt demonstrated at some length in its opening brief, the court of appeal's holding that the application of federal law is precluded by a choice-of-law clause specifying "the law of the place where the project is located"

did not in fact "arise" from any general principle of state contract law whatsoever, but was instead spontaneously conceived to dispose of the specific question of federal preemption that was presented by this case (see Opening Brief, pp. 36-41, 91-93fn.). Moreover, since the only evident function of this so-called "principle" is to determine the applicability of federal law under a choice-of-law clause, and since the only cases in which it has ever been applied by any court in any jurisdiction have been suits for enforcement of arbitration agreements under the Federal Arbitration Act (see Opening Brief, pp. 90-91), it can hardly be characterized as applying to "contracts generally," and indeed seems to fit much more closely the description of a rule that "takes its meaning precisely from the fact that a contract to arbitrate is at issue." Perry, supra, 2527n.9. Thus, once again, Stanford's own argument ultimately comes full circle to support a conclusion that is diametrically opposed to the one it is seeking to establish.

Stanford's only other point concerning this



issue is an observation to the effect that the application of federal law to the interpretation of provisions of the contract other than the arbitration clause might expand the range of situations in which "the same words in the same provisions [would] mean different things" depending on the factual and legal context of their application. For the most part, however, this is simply an unavoidable shortcoming of human language, in which it is inherent that "terms may shift in reference with occasions of use." Quine, *Word and Object* §30, p. 141 (1960). Nor is it so obviously inappropriate that contractual provisions should be applied somewhat differently when they affect the implementation of important federal policies, such as the one favoring arbitration. See Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, 460 U.S. at 24-25. Finally, in any event, no real danger of this sort of divergent interpretation is presented with respect to the particular issue involved here, since, as was shown in the opening brief, the decisions of the federal and state courts are virtually

unanimous in subscribing to a single uniform construction of the particular type of contractual provision that is at issue in this case.\*

Thus, Stanford's arguments are ultimately ineffective to disprove, and indeed only seem to reinforce, the proposition that the federal rule of "generous construction" of arbitration agreements is indeed fully applicable to the problem of interpretation that is presented by this case. Far from constituting an "amazing" extension of existing law, this particular application of this settled federal rule proceeds quite naturally and directly from both

---

\* Since the filing of the opening brief, two more decisions representing the overwhelming majority view on the interpretation of this type of choice-of-law provision have come to Volt's attention, one of which was located by further research and the other of which, surprisingly, was disclosed by Stanford itself, which mistakenly cites the decision in support of its otherwise irrelevant observation that contractual and statutory choice-of-law provisions designating the law of the place where a transaction is to be carried out are ordinarily interpreted to refer to state law where no question of the possible application of federal law is presented. Howard Elec. & Mech. Co. v. Frank Briscoe Co., 754 F.2d 847, 850 (9th Cir. 1985); Starr Elec. Co. v. Basic Constr. Co., 586 F.Supp. 964, 969n.5 (M.D.N.C. 1982) (cited at page 33 of Stanford's brief).

the language and the holdings of this Court's several decisions enunciating the content and scope of the rule. This rule therefore stands confirmed as a valid ground for sustaining both the Court's jurisdiction of this appeal and the ultimate conclusion that the decision below should be reversed on the merits.

B. In Any Event, the Federal Rule of "Generous Construction" of Arbitration Agreements Provides Only One of the Numerous Alternative Grounds That Support Volt's Position on This Appeal, the Remainder of Which Have Been Largely Ignored by Stanford in Its Responsive Brief.

---

Finally, at all events, even if the preceding analysis should be disregarded in favor of giving full credence to Stanford's minatory admonitions about the dire effects of applying the rule of "generous construction" in this case, this result would ultimately avail Stanford little. For, as it happens, the whole issue of the applicability of this federal rule to this case relates to only one of the numerous separate grounds that support Volt's position on both the jurisdictional issue and the merits of this appeal. Indeed, with regard to the merits of the case, Volt itself has readily

acknowledged that application of the rule of "generous construction" may well be redundant in the light of the several other compelling considerations that require the inclusion of federal law within the scope of the phrase "law of the place where the project is located" (Opening Brief, pp. 92-93). Similarly with respect to the issue of jurisdiction, Volt has adduced no less than seven alternative grounds, besides the doctrine of "generous construction," that would amply support the Court's assumption of jurisdiction over this appeal (Opening Brief, pp. 25-49, 53-58).

Although space does not permit a recapitulation of these numerous other reasons justifying Volt's position on these issues, there are, for present purposes, three important points that should be made about these several alternative grounds. First, as the discussion in the opening brief makes clear, none of these additional grounds is in any way dependent on an application of the rule of "generous construction" to this case, and all of them are therefore capable of vindicating Volt's posi-



tion entirely without regard to the outcome of the parties' opposing arguments about the application of that rule in this context. Second, Stanford has completely ignored many of these other grounds in its responsive brief, and in some cases has even expressly conceded their essential validity (e.g., Stanford's Brief, pp. 1-2, 12n.13). Finally, none of these alternative reasons is even arguably subject to the objection that the Court's reliance upon it to decide this case would effect an "amazing" or unwarranted expansion of the scope of federal law. Rather, as was demonstrated at length in the opening brief, each of them represents either a routine and closely circumscribed application of existing doctrine or a necessary corollary of some fundamental precept of federalism (see Opening Brief, pp. 25-49, 53-58).\*

---

\* This last point is perhaps best illustrated by Volt's observation, in its opening brief, that the court of appeal's determination whether federal law is encompassed within the phrase "law of the place where the project is located" was necessarily dependent on a resolution of the quintessentially federal question whether federal law is, in fact, one of the bodies of law applicable at "the place" where this project was carried out (continued)



For all these reasons, it is evident that Stanford's challenge to Volt's reliance on the principle of "generous construction" of arbitration agreements is not only unsound, but also ultimately futile. Even if the Court should heed Stanford's arguments on that issue, the ultimate conclusions reached in Volt's opening brief would still survive unscathed, because each of those conclusions is amply vindicated in any event by any of several alternative reasons that are essentially unaffected by Stanford's arguments.

---

(footnote cont'd.) (see Opening Brief, pp. 48-49). The doctrine that this sort of logical dependence of a state court's judgment on a federal issue affords a sufficient basis for sustaining this Court's jurisdiction to review the judgment is very well settled, and its employment as a ground for upholding jurisdiction in this case would in fact represent a much less expansive application of the doctrine than has been made in many of the prior cases in which it has been employed for this purpose. Compare, e.g., South Dakota v. Neville, 459 U.S. 553, 556n.5 (1983); St. Martin Lutheran Church v. South Dakota, 451 U.S. 772, 780n.9 (1981); United Air Lines v. Mahin, 410 U.S. 623, 630-32 (1973); Standard Oil Co. v. Johnson, 316 U.S. 481, 482-83, 485 (1942); State Tax Comm. v. van Cott, 306 U.S. 511, 513-15 (1939). See, generally, Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 557-63 (3d ed. 1988).

III. Stanford's Argument That This Case Should Be Reviewed by Certiorari Rather Than Appeal Is Without Merit and in Any Event Would Not Defeat the Court's Jurisdiction to Review the Court of Appeal's Judgment.

Stanford's argument that this case may not be heard by appeal, as opposed to certiorari, may be easily disposed of, since it contravenes the principles that have governed the application of 28 U.S.C. §1257(2) ever since the predecessor of that statute was first construed 65 years ago in the landmark decision of Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1923). In that case, the Court held that the "validity" of a state statute has been "drawn in question" within the meaning of that section whenever the appellant has contended in the court below that the statute would be invalid "as applied" to his particular situation, even though the statute is "not claimed to be invalid in toto and for every purpose." Id., 257 U.S. at 289. Likewise, it was held to be of "no importance" that the appellant has focussed his arguments on the circumstances attending the application of the statute rather than on its validity per se, so long as it appears that

he has expressly challenged the validity of the statute as applied to him at some point in the course of the proceedings. Id. at 290. Finally, the Court dismissed as irrelevant the question whether the state court has expressly addressed the issue of the statute's validity, holding that it is sufficient merely to show that the statute in fact has been "applied and enforced to the [appellant's] disadvantage" by the state court's judgment. Id. All of these basic principles thus laid down by this seminal decision have been reaffirmed and consistently applied by this Court in every subsequent decision involving the propriety of an appeal under section 1257(2) down to the present time. E.g., R.J. Reynolds Tobacco Co. v. Durham County, \_\_ U.S. \_\_, 107 S.Ct. 499, 505 (1986); McCarty v. McCarty, 453 U.S. 210, 219n.12 (1981); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 440-41 (1979).

This case fits squarely within the coverage of these settled rules. As Volt showed in its jurisdictional statement (at pp. 5-7), its claim that §1281.2(c) of the California Code of

Civil Procedure was preempted and rendered void as applied to this case was raised at every stage of the state-court proceedings, wherein Volt variously contended that the provisions of this statute, if so applied, would "directly conflict with the FAA," that the federal Act "would directly preempt the contrary prescription" of this state law, and that application of this section to this case would "violate[] the Supremacy Clause and is null and void" (J.S. App. E-6, E-9, F-1-2, F-8, F-13, G-7). The state courts nevertheless proceeded to apply and enforce the statute "to [Volt's] disadvantage" by affording Stanford the benefit of the statutory exemption from its duty to arbitrate despite the clear contrary dictates of federal law. Under the holdings in Dahnke-Walker and its progeny, this was plainly sufficient to bring this case within the terms of 28 U.S.C. §1257(2), and thus to authorize an appeal from the state court's judgment.

Stanford's only arguments to the contrary are indistinguishable from the arguments that were specifically rejected by the Court in

Dahnke-Walker and in every subsequent decision on this issue. Thus, while Stanford asserts that the state court's ruling in this case does not directly address the validity of the state statute but instead "simply upholds the validity of the parties' agreement,"\* these decisions hold that it does not "matter on what ground the court upheld and enforced the statute," so long as the statute was in fact applied by the court in the face of a claim that its application would offend federal law. Dahnke-Walker Milling Co. v. Bondurant, supra, 257 U.S. at 289. See also Japan Line, Ltd. v. County of Los Angeles, supra, 441 U.S. at 441; Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476 (1975). Similarly, while Stanford correctly observes that much of Volt's argument in the state courts and on this appeal "is directed to the contract interpretation" rather than to the validity of the state statute per se, these decisions further establish that "no importance"

---

\* This assertion is inaccurate in any event, since the court actually addressed the preemption claim at some length in its opinion and rejected that claim on its merits (JA 68-77).



is to be attached to the fact that the appellant addresses his principal arguments to particular issues affecting the statute's application, so long as he has made clear that the ultimate result he seeks is a ruling that the statute cannot be applied to his situation without transgressing the superior command of federal law. Dahnke-Walker, supra at 290. See also International Longshoremens Assn. v. Davis 476 U.S. 380, 385, 387n.8 (1986); McCarty v. McCarty, supra, 453 U.S. at 19n.12. Thus, unless this Court now wishes to disavow the venerable principles that have guided decision in this area for so many decades, Stanford's arguments on this issue, like the identical arguments unsuccessfully advanced in countless previous cases, must be emphatically rejected.\*

---

\* For the Court to repudiate these principles at this particular time would be especially inappropriate in the light of the recent amendment to the terms of 28 U.S.C. §1257, which has effectively abolished the distinction between certiorari and appeal in this type of case. Public Law 100-352, 102 Stat. 662. Under this enactment, the entire issue under discussion here will be rendered moot in all cases arising after the enactment's effective date of September 25, 1988. Id., §§3, 7.

Nor do the authorities cited by Stanford cast any doubt on this conclusion, since none of them involved any issue even remotely similar to the one presented here. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 247 (1984) (validity of statute never raised in proceedings below); Local 926, Int'l. Union of Operating Engrs. v. Jones, 460 U.S. 669, 675 (1983) (state's common law not a "statute"); Perry Educ. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 42-43 (1983) (public contract not a "statute"). Indeed, the only real relevance of any of those decisions to the present case derives from the fact that the Court in each of those cases, upon dismissing the appeal, simultaneously granted certiorari to review the "important" issue presented by the case. Silkwood, supra at 248; Perry Educ. Assn., supra at 43-44. Accord Local 926, supra at 675. As the Court knows, this practice, which is sanctioned by statute, is quite common in cases in which an appeal is found to have been improvidently taken after full briefing on the merits. 28 U.S.C. §2103. See Stern et al., Supreme Court

Practice 117-18 (6th ed. 1986). On the authority of the decisions cited by Stanford itself, therefore, Volt respectfully requests that, in the unlikely event Stanford's argument on this issue should be accepted, the Court should then treat Volt's jurisdictional statement as a petition for certiorari and should proceed to review the case on that basis.

IV. Stanford's Contention to the Contrary Notwithstanding, There Is No Serious Doubt That the Federal Arbitration Act Would Preempt the Conflicting Prescriptions of California Law if the Choice-of-Law Clause in the Parties' Agreement Were Not Interpreted to Foreclose the Application of the Act to This Case.

Stanford has proffered an alternative argument to the effect that the Arbitration Act would not preempt Cal.Code Civ.Proc. §1281.2(c) even if the choice-of-law clause were interpreted to permit the application of federal law to this case (Stanford's Brief, pp. 43-50). This argument has not previously been given a full-dress exposition by Stanford in the course of this litigation, having been presented only in a cursory fashion or not at all in Stanford's earlier filings (see, e.g., Motion to Dismiss or Affirm, p. 8n.2). This history of

comparative neglect is understandable since, as will now be demonstrated, the argument does not in fact merit serious consideration.\*

Stanford's argument goes something like this: Volt's contention that the Arbitration Act would preempt the conflicting prescriptions of §1281.2(c) "assumes the premise that §§3 and 4 [of the federal Act] apply in state court" (Stanford's Brief, p. 44). But this Court's decisions have indicated that only the substantive provisions of section 2 of the Act are applicable in state proceedings, and the Court has expressly declined, in a certain footnote in its opinion in Southland Corp. v. Keating, supra, to apply the "procedural" provisions of

---

\* Stanford's assertion of this argument is also somewhat paradoxical in the light of its simultaneous contention that this Court lacks jurisdiction to hear this case as an appeal under 28 U.S.C. §1257(2). As indicated in the preceding section, the express premise of the latter contention is that the only issue presented by this case is the interpretation of the choice-of-law clause in the parties' agreement (see Stanford's Brief, p. 4). By now arguing that the case also presents a serious question whether state law would be preempted even in the absence of the choice-of-law clause, Stanford would seem to have contradicted this essential premise of its own earlier argument.

sections 3 and 4 to the state courts (id., pp. 45-47). Since the essential premise of Volt's contention is thus belied, the contention itself must be rejected, and this Court must accordingly hold that section 1281.2(c) would survive federal preemption even in the absence of the choice-of-law clause (id.).

Every element of this argument is erroneous. In the first place, notwithstanding the somewhat enigmatic footnote in the Southland opinion, the law is reasonably well settled to the effect that sections 3 and 4 of the Arbitration Act do indeed apply in state courts to the same extent as in federal courts. Secondly, in any event, Volt's contention on this issue does not in fact "assume the premise" that §§3 and 4 are applicable in state proceedings, but is fully supportable on an entirely independent ground, and is validated in any event by the specific holdings of this Court on the particular issue that is presented by this case. Both of these propositions will be demonstrated in the discussion that follows.

The question whether §§3 and 4 of the Arbi-



tration Act apply in state proceedings was examined at some length in Volt's reply brief in the court of appeal (id., pp. 15-34). While space does not permit a repetition of that discussion here, its essential conclusions may be briefly summarized. Volt showed, first of all, that although this Court had indeed expressly disclaimed any decision of this question in its opinion in the Southland case (465 U.S. at 16 n.10), the Court had already clearly ruled, in its earlier opinion in Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., supra, that "state courts, as much as federal courts, are obliged to grant stays of litigation under §3 of the Arbitration Act," and that the application of section 3 in state courts, and perhaps section 4 as well, was indeed "necessary to carry out Congress' intent to mandate enforcement of all covered arbitration agreements." Id., 460 U.S. at 26 and n.34. Second, despite the Court's reservation of the question in Southland, the actual holding of that case seemed to reaffirm the view that the application of these sections in state courts was indeed mandated by the Act.

See Southland, supra, 465 U.S. at 24, 31n.20 (O'Connor, J., noting in dissent that the Court had in fact enforced the agreement at issue in that case by "procedures that mimic those specified for federal courts by FAA §§3 and 4," and had thus effectively "made §3 of the FAA binding on the state courts"). See also Hirshman, The Second Arbitration Trilogy: the Federalization of Arbitration Law, 71 U.Va.L.Rev. 1305, 1344, 1362n.368 (1985). Third, the state courts themselves had unanimously held, both before and after Southland, that §§3 and 4 are fully applicable to state proceedings. Main v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 136 Cal.Rptr. 378, 381 (Cal.App.1977); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Melamed, 405 So.2d 790, 793 (Fla.App. 1981); Paine, Webber, Jackson & Curtis v. McNeal, 239 S.E.2d 401, 403 (Ga.App.1977); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 666 S.W.2d 604, 609-10 (Tex.App. 1984), cert. den. 469 U.S. 1127 (1985); Allison v. Medicab Int'l., Inc., 597 P.2d 380, 382 (Wash. 1979). Finally, in the course of a dissent from the denial of

certiorari in a case arising after Southland, two of the justices who had joined in the Southland opinion, while acknowledging that Southland had indeed "reserved the question," had nevertheless cited with apparent approval both the Court's prior pronouncements in Moses H. Cone and the unanimous decisions of the state courts to the effect that section 3, at least, was indeed enforceable in the state courts. Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 469 U.S. 1127, 1129n.2 (1985) (White and Blackmun, JJ., dissenting). From all these indications, it seemed clear, despite the disclaimer in Southland, that the applicability of §§3 and 4 of the Act in state courts had become reasonably well established.

Well nigh conclusive verification of this view was furnished by this Court after the filing of Volt's reply brief in the court of appeal when the Court handed down its 1987 decision in Perry v. Thomas, supra. In that case, the Court reversed a California court of appeal's denial of a petition to compel arbitration that had been brought in the state

court solely on the basis of section 4 of the federal Act. Id., 107 S.Ct. at 2523n.1. Although the Court's only express discussion of the applicability of that section consisted of the general observation that "[s]ection 4 mandates judicial enforcement of arbitration agreements" (id.), the holding of the Court requiring enforcement of the petition on these facts necessarily provided a clear affirmation that section 4 (and therefore necessarily §3 as well - see Moses H. Cone, supra at 26n.34) is in fact applicable in state-court proceedings. Thus, any doubt that may have been expressed on this score in the Southland opinion has now apparently been resolved by the Court, with the result that the applicability of §§3 and 4 in state courts can now confidently be characterized as the settled law of the land. To the extent that Volt's claim of preemption "assumes the premise" that these sections are applicable in this case, that premise therefore seems eminently sound and firmly established.

Secondly, in any event, Volt's conclusion

that Cal. Code Civ. Proc. §1281.2(c) is preempted by the federal Act is not by any means exclusively dependent on the premise that sections 3 and 4 apply to this state court proceeding. As will now be shown, this conclusion follows directly from the decisions of this Court without reference to that particular premise, and is also amply justifiable on at least one other independently sufficient and fully persuasive rationale.

The question whether the federal Act preempts state procedures exempting a party from his duty to arbitrate because of the presence of related non-arbitrable claims against third parties was specifically resolved by this Court in its decision in Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra. That case involved a factual situation identical to the one presented here, wherein a construction contractor seeking to compel arbitration of a dispute with the owner had been denied relief on account of the pendency of a state-court suit involving a non-arbitrable claim for indemnity against the project architect. Although the ultimate issue



presented to this Court was whether a federal district court should have abstained from enforcing the arbitration agreement during the pendency of the state proceedings, the Court was also required to address the further question whether the state court could properly refuse to compel arbitration under these circumstances, in order to dispose of the owner's contention that duplication and inefficiency would result from the federal court's enforcement of the agreement to arbitrate. That issue was resolved by the Court as follows (id., 460 U.S. at 20-21; emphasis in original):

"The Hospital points out that it has two substantive disputes here - one with Mercury, ... and the other with the architect. ... It is true, therefore, that if Mercury obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That misfortune, however, is not the result of any choice between the federal and state courts; it occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement. Under the Arbitration Act, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement. If the dispute between Mercury and the Hospital is arbitrable under the Act, then the Hospital's two disputes will be resolved separately - one in arbitration, and the other (if at all) in state court litigation. Conversely, if the dispute

between Mercury and the Hospital is not arbitrable, then both disputes will be resolved in state court. But neither of those two outcomes depends at all on which court decides the question of arbitrability. Hence, a decision to allow that issue to be decided in federal rather than state court does not cause piecemeal resolution of the parties' underlying disputes."

Thus, the precise issue presented by this case - whether federal law requires a state court to enforce an arbitration agreement despite the presence of non-arbitrable claims against third parties - has been squarely decided by this Court. Whatever uncertainty may subsequently have been created, by the Southland footnote or otherwise, regarding the general theoretical underpinnings of federal preemption in this area, this specific ruling of the Cone decision has never been questioned by the Court, and indeed has been expressly reaffirmed on at least one occasion. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985). It follows that, whether this conclusion is "premised" upon sections 3 and 4 of the Act or some other basis, the specific rule that governs the disposition of the particular issue presented here must be regarded as

well settled. Since the provisions of Cal. Code Civ. Proc. §1281.2(c) directly contravene that rule, those provisions must therefore be deemed preempted by federal law. Accord, Liddington v. The Energy Group, 238 Cal.Rptr. 202, 206-7 (Cal.App. 1987).

Moreover, even if the precedential weight of the Cone decision were not alone sufficient to dictate this result, and even if, as is being assumed here, sections 3 and 4 of the Act are likewise unavailable for this purpose, the conclusion that the federal Act preempts California law on this issue would still be readily supportable on a compelling alternative ground. That alternative ground is provided by the settled general rule that a "federal right cannot be defeated by the forms of local practice," and that even the purely substantive requirements of federal law may therefore have the effect of preempting state procedures where those procedures "impose unnecessary burdens upon rights of recovery authorized by federal laws." Brown v. Western Ry. Co., 338 U.S. 294, 296, 298-99 (1949).

This familiar principle has been applied to effect a partial "federalization" of state procedures under a variety of federal statutes, and has even been acknowledged as a potential alternative basis for the Court's recent preemption decisions under the Arbitration Act by the most prolific dissenter from those decisions. Southland Corp. v. Keating, supra, 465 U.S. at 31 (O'Connor, J., dissenting). See, e.g., Felder v. Casey, \_\_ U.S. \_\_, 56 USLW 4689, 4691-92, 4694-95 (June 22, 1988); St. Louis S.W. R.R. Co. v. Dickerson, 470 U.S. 409, 411 (1985); Liner v. Jafco, Inc., 375 U.S. 301, 304-9 (1964); Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 363 (1952); Brown v. Western Ry. Co., supra, 338 U.S. at 296-98; Garrett v. Moore-McCormack Co., 317 U.S. 239, 243-47 (1942); American Ry. Express Co. v. Levee, 263 U.S. 19, 20 (1923). See, generally, Bator et al., supra at 628-38. The most recent thorough exposition of the principle was provided by the Court's opinion in Felder v. Casey, supra, where the Court held that a state notice-of-claims statute was preempted by the



substantive provisions of 42 U.S.C. §1983 in an action brought under that statute in a state court. In justification of this holding, the Court said (56 USLW at 4691, 4694-95):

"[W]here state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.' Brown v. Western Railway of Alabama, 338 U.S. 294, 296 (1949). The question before us today, therefore, is essentially one of preemption: is the application of the State's notice-of-claim provision to §1983 actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"? Perez v. Campbell, 402 U.S. 637, 649 (1971) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). ...

"Respondents ... note that '[t]he general rule, bottomed deeply in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' Brief for Amici Curiae 8 (quoting Hart, The Relations Between State and Federal Law, 54 Colum.L.Rev. 489, 508 (1954)). ... [But] [f]ederal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws.' Brown v. Western R. Co. of Alabama, 338 U.S., at 298-99; ...

"[A state] may not alter the outcome of federal claims it chooses to entertain in its courts by demanding compliance with outcome-determinative rules that are inapplicable when brought in federal court, for '[w]hat-ever spring[s] the State may set for those who are endeavoring to assert rights that



the State confers, the assertion of federal rights, when plainly and seasonably made, is not to be defeated under the name of local practice.' Brown v. Western R. Co. of Alabama, 338 U.S., at 299 (quoting Davis v. Wechsler, 263 U.S. 22, 24 (1923))."

These principles have obvious application in the present context. Since there is no dispute that if Volt's petition to compel arbitration had been brought in a federal court, the petition would have been granted despite the obstacle to such enforcement presented by Cal. Code Civ. Proc. §1281.2(c), the application of that state statute in this case would necessarily "alter the outcome" of the case relative to the outcome that would have been achieved in a federal court. Felder v. Casey, supra, 56 USLW at 4695. Similarly, since this Court has specifically held that "[t]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements [to arbitrate] ... even if the result is piecemeal litigation" (Dean Witter Reynolds, Inc. v. Byrd, supra, 470 U.S. at 221), it is also clear that the statutory immunity from arbitration conferred

by §1281.2(c) would "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Felder v. Casey, supra at 4691. Given these circumstances, the principles laid down in Felder v. Casey and the numerous similar decisions cited above clearly dictate that this state statute must be denied enforcement in this case on the ground that it is preempted by the overriding substantive prescriptions of the Federal Arbitration Act.

It follows that these decisions would be sufficient in themselves to require this result without regard to either the precedential effect of the Cone decision or the question of the applicability of the "procedural" provisions of sections 3 and 4 of the federal Act in state courts. On any conceivable version of the existing law, therefore, there is no arguable basis for Stanford's contention that Cal. Code Civ. Proc. §1281.2(c) might survive federal preemption in this case even in the absence of the choice-of-law clause in the parties' contract.

V. Stanford's Argument About the Perceptions of "Ordinary People," to the Extent It Has Any Meaning at All, Is Basically Inaccurate.

Another new argument raised by Stanford in its responsive brief consists of its repetitive assertions that Volt's proffered interpretation of the choice-of-law clause reflects an esoteric view of the language of the clause that would not be shared by "ordinary people" (Stanford's Brief, pp. 34-39). Stanford chides Volt, in particular, for citing The Federalist in support of its contention that the contractual language must be interpreted to encompass federal law. Stanford opines that "ordinary people ... do not travel with the Federalist" and therefore, presumably, would be unlikely to know that a reference to "the law of the place where the project is located" might include federal law (id., p. 39).

To the extent that these observations about the perceptions of "ordinary people" amount to anything more than vacuous speculation, they are in any event fundamentally inaccurate. In fact, if there is any authority - among all the cases, statutes, treatises, etc., cited by the

parties on this appeal - that is most likely to be familiar to "ordinary people," it is undoubtedly The Federalist. Certainly, that work is more commonly known to the general public than section 1281.2(c) of the California Code of Civil Procedure, or, for that matter, the Federal Arbitration Act. Similarly, if there is any legal principle, among all those bandied about by the parties in this proceeding, that is most likely to be known to these same "ordinary people," it is the rule that federal law is "the supreme law of the land" in this federal union.

Once again, therefore, Stanford is hoist by its own petard. If its appeal to the views of "ordinary people" ultimately leads anywhere, it leads to the conclusion that most "ordinary people" would have readily perceived the phrase "law of the place where the project is located" to encompass federal law, because, as every high-school civics student well knows, federal law, in its embodiment as the supreme law of every state, is applicable at every "place" throughout the nation.

VI. Conclusion

For all of these reasons, Volt respectfully submits that the arguments of Stanford discussed herein should be rejected, that the substantive issues presented by this case should be considered on their merits, and that the judgment of the court of appeal should be reversed with a direction that Volt's petition to compel arbitration be granted.

Dated: August 9, 1988

Respectfully submitted,

JAMES E. HARRINGTON  
ROBERT B. THUM  
DEANNE M. TULLY  
PETTIT & MARTIN

Attorneys for Appellant